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Looking north east at slide and quarry wall, showing dumping platform and water.



*Cases Determined by the St. Louis,
Kansas City and Springfield ...*

Missouri. Courts of Appeals



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OF THE
STATE OF MISSOURI

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FOR THE
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February 1 to July 6, 1915
By JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE
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By MORRISON PRITCHETT of the Webb City Bar.
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JUDGES OF THE
ST. LOUIS COURT OF APPEALS.

HON. GEORGE D. REYNOLDS, *Presiding Judge.*

HON. ALBERT D. NORTON, }
HON. WILLIAM H. ALLEN, } *Judges.*

JOSEPH FLORY, *Clerk.*

THOMAS E. FRANCIS, *Reporter.*

JUDGES OF THE
KANSAS CITY COURT OF APPEALS.

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HON. JAMES M. JOHNSON, }
HON. FRANCIS H. TRIMBLE, } *Judges.*

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HON. JOHN T. STURGIS, } *Judges.*

GEORGE H. DANIEL, *Clerk.*

MORRISON PRITCHETT, *Reporter.*

CASES REPORTED.

(Cases are inserted in the order received from the reporter.)

A

American Automobile Insurance Company, Farber v.	307
American Central Insurance Company, Copeland v.	435
American Insurance Company, Weston v.	282
American Surety Company of New York, State ex. rel. Whitlow, v.	191
Ankrum, Commercial State Bank v.	251
Appling, State ex rel. See v.	589
Arnold, Mathias v.	352
Asbury v. Shain	667
Atlas Portland Cement Company, Yost v.	422

B

Baldwin v. Harvey et al., Receivers	233
Barr Dry Goods Company, Wade v.	629
Belch v. Roberts, Executrix	243
Bloch, Koslosky v.	257
Boeckeler Lumber Company v. Wahlbrink	334
Botts v. St. Louis and Hannibal Railway Company	676
Buford, Hanna v.	654
Bulson v. International Shoe Company	128
Burroughs Adding Machine Company, O'Brien v.	501
Burrows, McManus v.	594

C.

Chicago, Burlington and Quincy Railroad Company, Cross v. ..	202
City of Kirkwood, Schueler v.	575
Clark v. Clark	278
Clark, Slothower v.	105
Cockrell v. Williams	246
Coleman v. Lana	370
Commercial State Bank v. Ankrum	251
Copeland v. American Central Insurance Company	435
Cox, Heagy v.	377
Cross v. Chicago, Burlington and Quincy Railroad Company ..	202

D

Dana, Coleman v.	370
Daniels v. Goeke	1
Dessauer v. Supreme Tent of the Knights of Maccabees of the World	76

E

Egger v. Wilcox	31
Estate of Turner, Stewart v.	272

(iv)

[191 M. A.]

F

Farber v. American Automobile Insurance Company	307
Fellhauer v. Quincy, Omaha and Kansas City Railroad Com- pany	137
Fifth-third National Bank v. McCrory	295
Finnell Estate v. Howard	214
Foresters, United Order of, Kribs v.	524
Foresters, Supreme Court United Order of, Schmidt v.	415
Fry, Stone v.	607

G

Globe Surety Company of Kansas City, Missouri, Uhrich v.	111
Goeke, Daniels v.	1
Griswold, Commissioner, v. Haas	97

H

Haas, Griswold, Commissioner, v.	97
Hanna v. Buford	654
Harvey et al., Receivers, Baldwin v.	233
Heagy v. Cox	377
Heman, O'Brien v.	477
Hiram Lloyd Building and Construction Company, Price v.	395
Howard, In re. Finnell Estate v.	214
Humphreys v. St. Louis and Hannibal Railway Company	710
Huxoll, State v.	304

I

In re. Finnell Estate v. Howard	214
In re. Krauthoff	149
International Shoe Company, Bulson v.	128

J

Jaggi v. Prudential Insurance Company of America	384
Johnson, Klein v.	453

K

Kansas City Casualty Company v. Westport Avenue Bank	287
Kirkwood, City of, Schueler v.	575
Klein v. Johnson	453
Koslosky v. Bloch	257
Krallman v. Potashnick	516
Krauthoff, In re.	149
Krauthoff, Meredith v.	149
Kribs v. United Order of Foresters	524

L

Lentz, Shelton v.	699
Lloyd Building and Construction Company, Price v.	395
Lutz, Reeves v.	550

M

Maccabees, Knights of, Dessauer v.	76
Maccabees, Knights of, Parker v.	508
Marolf v. Marolf	239

Mathias v. Arnold	352
Meredith v. Krauthoff	149
Metropolitan Life Insurance Company, Schuler v.	52
Metropolitan Street Railway Company, Baldwin v.	233
Metropolitan Street Railway Company, Shown v.	292
Missouri and Kansas Telephone Company, Mullery v.	118
Montgomery Ward & Company, White v.	268
Moore v. McHaney	686
Musick, O'Malley v.	405
Mullery v. Missouri & Kansas Telephone Company	118

Mc.

McCardle v. Peck Dry Goods Company	263
McCrory, Fifth-third National Bank v.	295
McHaney, Moore v.	686
McManus v. Burrows	594

N

Nelson, Richardson Machinery Company v.	230
Night and Day Bank v. Rosenbaum	559

O

O'Brien v. Burroughs Adding Machine Company	501
O'Brien v. Heman	477
O'Donnell, Paine v.	300
O'Malley v. Musick	405

P

Parke-Davis & Company, State ex rel. Spellman v.	219
Parker v. Supreme Tent, Knights of Maccabees of the World ..	508
Paine v. O'Donnell	300
Peck Dry Goods Company, McCardle v.	263
Pfeifer v. Supreme Tribe of Ben Hur	38
Pillman, Woldert Grocery Company v.	15
Potashnick, Krallman v.	516
Price v. Lloyd Building & Construction Company	395
Prudential Insurance Company of America, Jaggi, v.	384

Q

Quincy, Omaha & Kansas City Railroad Company, Tellhauer v.	137
--	-----

R

Richardson Machinery Company v. Nelson	230
Reeves v. Lutz	550
Roberts, Executrix, Belch v.	243
Rosenbaum, Night and Day Bank, v.	559

S

Sailors v. Westchester Fire Insurance Company	199
St. Louis & Hannibal Railway Company, Botts v.	676
St. Louis & Hannibal Railway Company, Humphreys v.	710
St. Louis & San Francisco Railroad Company, Thomure v.	640
Schmidt v. Supreme Court United Order of Foresters	415
Schueler v. City of Kirkwood	575

Schuler v. Metropolitan Life Insurance Company	52
Shain, Asbury v.	667
Shelton v. Lentz	699
Showen v. Metropolitan Street Railway Company	292
Slothower v. Clark	105
Sontag v. Ude	617
Sparkman v. Wabash Railroad Company	463
Stewart v. Estate of Thomas Turner	272
Stone v. Fry	607
Supreme Court United Order of Foresters, Schmidt v.	415
Supreme Tent of Knights of Maccabees of the World, Dessauer v.	76
Supreme Tent of Knights of Maccabees of the World, Parker v.	508
Supreme Tribe of Ben Hur, Pfeiffer v.	38

STATE

State v. Huxoll	304
-----------------------	-----

STATE EX REL.

State ex rel. See v. Appling	589
State ex rel. Speelman v. Parke-Davis & Company	219
State ex rel. Whitlow v. American Surety Company of New York	191

T.

Tapscott v. Tyson	253
Thompre v. St. Louis & San Francisco Railroad Company	640
Turner, Estate of, Stewart v.	272
Tyson, Tapscott v.	253

U

Ude, Sontag v.	617
United Order of Foresters, Kribs v.	524
Uhrich v. Globe Surety Company of Kansas City, Missouri ..	111

W

Wabash Railroad Company, Sparkman v.	463
Wade v. Barr Dry Goods Company	629
Wahlbrink, Boeckeler Lumber Company v.	334
Westchester Fire Insurance Company, Sailors v.	199
Weston v. American Insurance Company	282
Westport Avenue Bank, Kansas City Casualty Company v.....	287
White v. Montgomery Ward & Company	268
Wilcox, Egger v.	31
William Barr Dry Goods Company, Wade v.	629
Williams, Cockrell v.	246
Woldert Grocery Company v. Pillman	15

Y

Yost v. Atlas Portland Cement Company	422
---	-----

CASES CITED.

A

Adair v. Mette, 156 Mo. 496	615
Adams v. Cost, 62 Mo. 264	147
Aloe v. Reserve Assn., 561 Mo. 49	536
Aloe v. Life Assn., 164 Mo. 675	536, 548
American Surety Co. & Construction Co., 182 Mo. App. 667	585
Andres v. Ins. Co., 168 Mo. 165	390
Armstrong v. Modern Brotherhood, 245 Mo. 153	510
Armstrong v. Modern Brotherhood, 132 Mo. 171	513
Asbury v. Hicklin, 181 Mo. 658	613
Ass'n v. Van Ness, 61 Mo. App. 361	653
Atkinson v. Railroad, 63 Mo. 367	723
Austin v. Shoe Co., 176 Mo. App. 546	13

B

Baldwin v. Davidson, 139 Mo. 118	413
Bank v. Bank, 244 Mo. 575	388
Bank v. Birch, 154 Mo. App. 631	232
Bank v. Blell, 57 Mo. App. 410	245
Bank v. Byers, 139 Mo. 627	233
Bank v. Chick, 170 Mo. App. 343	115
Bank v. Douglass, 178 Mo. 664	694
Bank v. Evans, 176 Mo. App. 704	572
Bank v. Hanks, 142 Mo. App. 110	296
Bank v. Leavitt, 65 Mo. 562	572
Bank v. Manning, 133 Mo. 294	613
Bank v. Railroad, 119 Mo. App. 1	685
Bank v. Redfern, 141 Mo. App. 386	232
Bank v. Securities Co., 141 Mo. App. 324	462
Bank v. Tracy, 77 Mo. 594	197
Barr v. Hays, 172 Mo. App. 591	473
Battles v. Railroad, 178 Mo. App. 596	135
Baustian v. Young, 152 Mo. 317	505
Bean v. Railroad, 212 Mo. 331	434, 720
Benton v. St. Louis, 21 Mo. 687	498
Beshears v. Rowe, 46 Mo. 501.	694, 696
Biegler v. Legion of Honor, 57 Mo. App. 419	49
Biscuit Co. v. Grocer Co., 143 Mo. App. 300	289
Blarkwell v. Insurance Co., 80 Mo. App. 75	285
Blake v. Meadows, 225 Mo. 46	376
Bless v. Jenkins, 129 Mo. 657	697
Blodge v. Perry, 97 Mo. 263	198
Boggs & Leathe v. Insurance Co., 30 Mo. 63, 68	327
Boland v. Ross, 120 Mo. 208	252
Poone Lumber Co. v. Niedermeyer, 187 Mo. App. 180	694
Bowen v. Railroad, 95 Mo. 268	270
Bradley v. Woodmen of America, 146 Mo. App. 428	49
Brennan v. Hildebrandt, 137 Mo. App. 82	167
Brewer v. Carey, 148 Mo. App. 193	167
Brick Co. v. Burr, 76 Mo. 380	260
Brittain v. Murphy, 118 Mo. App. 235	245

Brown v. Asphalt Co., 210 Mo. 260	462
Brown v. Brown, 53 Mo. App. 453	188
Brown v. Brown, 47 Mo. 130	694
Browning v. Railroad, 124 Mo. 55	414, 508
Brunke v. Telephone Co., 112 Mo. App. 623	239
Buescking v. Gas Co., 73 Mo. 219	499
Burgar v. Railroad, 112 Mo. 238	134
Burge v. Railroad, 244 Mo. 76, 94, 96	298
Burger v. Railroad, 139 Mo. App. 62	683
Burnes v. Wilson, 1 Mo. App. 279	256
Burns v. Railroad, 151 Mo. 573	685
Bushong v. Taylor, 82 Mo. 671	606
Buker v. Railroad, 155 Mo. App. 287	146
Byars v. Doores, 20 Mo. 284	104

C

Campbell v. Pope, 96 Mo. 468	224
Campbell v. Woods, 122 Mo. App. 719	462
Cannon v. Boswell, 117 Mo. App. 473	260
Cantwell v. Lead Co., 199 Mo. 1, 42	252
Carlisch v. Railroad, 129 Mo. 728, 729	473
Carman v. Harroh, 182 Mo. App. 365, 376	260
Carney v. Brewing Co., 150 Mo. App. 437	432
Carroll v. Meek, 155 Mo. App. 337	360
Carroll v. Peak, 156 Mo. App. 446	272
Carroll v. Railroad, 157 Mo. App. 247	9, 72, 612
Carter v. Carter, 88 Mo. 302	279
Case v. Carland, 175 S. W. 200	281
Cash v. Railroad, 81 Mo. App. 109	681
Caskey v. Edwards, 128 Mo. App. 237	705, 708
Charles v. White, 214 Mo. 187	101
Chandler v. Gloyd, 217 Mo. 394	143
Cheatham v. Cheatham, 10 Mo. 296	279
Chenoweth v. Express Co., 93 Mo. App. 185	697
Chilton v. Lindsay, 38 Mo. App. 57	353
Christy v. St. Louis, 20 Mo. 143	589
City of St. Louis v. Von Puhl, 133 Mo. 561	114, 116
Clark v. Insurance Co., 52 Mo. 273	359
Claudy v. Royal League, 259 Mo. 92	89, 95
Clippard v. Transit Co., 202 Mo. 432	207
Coleman v. Stoke, 159 Mo. 43	376
Coleman v. Hagey, 252 Mo. 102	376
Collins v. Collins, 53 Mo. App. 470	279
Combs v. Insurance Co., 40 Mo. 148	326
Compher v. Telephone Co., 127 Mo. App. 533	143
Conley v. Drug Co., 218 Mo. 238	267
Connell v. Western Union, 116 Mo. 34	264
Corky v. Railroad, 150 Mo. 457	507
Coscarella v. Insurance Co., 175 Mo. App. 130	69
Conlter v. Conlter, 124 Mo. App. 149	279
Cousins v. Railroad, 66 Mo. 572	144
Crader v. Railroad, 181 Mo. App. 537	402, 432
Cravens v. Insurance Co., 148 Mo. 583	66
Crone v. Oil Co., 176 Mo. 349	434
Crook v. Tull, 111 Mo. 283	605
Crossan v. Insurance Co., 133 Mo. App. 537	314
Crim v. Walker, 79 Mo. 335	252
Crutcher v. Railroad, 132 Mo. App. 311	264
Cummings v. Cummings, 51 Mo. 261	261
Cummings v. Parker, 250 Mo. 439	452

D

Daggs v. Insurance Co., 136 Mo. 382, 395	315, 329
Dalley v. Maxwell, 152 Mo. App. 415	255
Dairy Co. v. Sawyer, 16 Mo. App. 1	222
Dalton v. Register, 248 Mo. 150	280
Davidson v. Transit Co., 211 Mo. 320	720
Dawson v. Railroad, 76 Mo. 514	683
Deeds v. Railroad, 157 Mo. App. 463	134
Denchler v. Railroad, 51 Mo. App. 156	473
Dennis v. Modern Brotherhood, 119 Mo. 215	513
De Stelger v. Railroad, 73 Mo. 33	723
Dimmitt v. Dimmitt, 167 Mo. App. 94	179
Dix v. Martin, 171 Mo. App. 261	169
Dix v. Morris, 66 Mo. 514	196, 198
Dobyns v. Rice, 22 Mo. 448	694
Dolan v. Insurance Co., 88 Mo. App. 666	327, 332
Dooley v. Railroad, 110 S. W. 135	146
Dowling v. Allen, 74 Mo. 13	134
Drake v. Jones, 27 Mo. 428	359
Dreyfus v. Railroad, 124 Mo. App. 593, 594	447
Dunklin v. Clark, 51 Mo. 60	359
Dunn v. Railroad, 68 Mo. 268	722, 724
Dye v. Railroad, 135 Mo. App. 254	264

E

Edwards v. City of Kirkwood, 147 Mo. 599	585
Elliott v. Life Ass'n., 163 Mo. 132	546
Ellis v. Harrison, 104 Mo. 276	114
Erwin v. Kansas City, etc. Railroad, 94 Mo. App. 289	653
Ess v. Griffith, 139 Mo. 322	245
Ex parte Ingenbøhs, 173 Mo. App. 261	169

F

Farrar v. Railroad, 249 Mo. 210	445
Feldeworth v. Railroad, 181 Mo. App. 640	469
Ferguson v. Gentry, 206 Mo. 189	219
Fields v. Railroad, 169 Mo. App. 624	625
Fish v. Railroad, 172 S. W. 340	210
Fisher & Co. v. Anslyn, 30 Mo. App. 316	342
Floyd v. Insurance Co., 72 Mo. App. 455	72
Floyd v. Woodmen of America, 166 Mo. App. 166	74
Forbes v. Dunnivant, 198 Mo. 193	270
Foster v. Byrd, 119 Mo. 168	615
Fowler v. Caw, 63 Mo. App. 486	198
Francis & Hunter v. A. O. U. W., 150 Mo. App. 347	391
Freeman v. Freeman, 94 Mo. App. 453	188

G

Gallemore v. Gallemore, 115 Mo. App. 179	241
Gamble v. Gibson, 59 Mo. 585	195
Garretzen v. Duenckel, 50 Mo. 104	143
Gartzen v. Buenekel, 50 Mo. 108	109
Gentry v. Insurance Co., 15 Mo. App. 215	324
George v. Railroad, 225 Mo. 364	207
George v. Railroad, 214 Mo. 551	683
Gerst v. St. Louis, 185 Mo. 191, 211	723
Gibson Insurance Co., 82 Mo. 515	284, 314
Glassman v. Harry, 170 S. W. 403	298

Glenn v. Gunn, 38 Mo. App. 423	216
Goodman v. Railroad, 71 Mo. App. 460	722, 728
Goodman v. Griffiths, 238 Mo. 714, 715	388
Gordon v. Gordon, 128 Mo. App. 710	279
Graham v. Savings Inst., 46 Mo. 186	291
Graham v. Shoe Co., 165 Mo. App. 361	144, 147
Grand Lodge v. McFadden, 213 Mo. 269, 284	92
Gray v. Packet Co., 64 Mo. 47	722, 728
Green v. Estes, 82 Mo. 337	694
Greer v. Redman, 92 Mo. 375	613
Griffith v. Canning Co., 54 Mo. 282	216
Griswold v. Haas, 145 Mo. App. 578	99, 103
Grocer Co. v. Bank, 71 Mo. App. 132	289
Grogan v. Broadway, etc. Co., 87 Mo. 231	499
Guffey v. O'Relley, 88 Mo. 418	347

H

Hale v. Stuart, 76 Mo. 20	697
Hall v. Coal & Coke Co., 260 Mo. 351	721
Ham Lead and Zinc Co. v. Lead Co., 251 Mo. 721	9
Hamilton v. Railroad, 123 Mo. App. 619	124
Hampham v. Long, 70 Mo. App. 351	216
Hance v. Express Co., 48 Mo. App. 179	680
Hanford v. Assn., 122 Mo. 50	546, 548
Harding v. Railroad, 248 Mo. 663	237
Hastings v. Myers, 21 Mo. 519	216
Hardwick v. Railroad, 181 Mo. App. 156	208
Harkness v. Janis, 182 Mo. 231	30
Hartpence v. Rogers, 143 Mo. 634	404
Hartwell v. Crumb, 90 Mo. 629, 640	249
Haulthaus v. Hornbottle, 60 Mo. 442	361
Haven v. Insurance Co., 149 Mo. App. 291	66
Havens v. Insurance Co., 123 Mo. 403	328
Hawkins v. McGroarty, 10 Mo. 516	222
Haynes v. Johnson, 141 Mo. App. 506	695
Hays v. Hogan, 180 Mo. App. 237	255
Hays v. Poplar Bluff, 263 Mo. 516	704
Heden v. Schneblin, 126 Mo. App. 485	694
Henderson v. Assn., 107 Mo. 50	515
Henderson v. Kansas City, 177 Mo. 477	134
Henderson v. Cass County, 107 Mo. 50	514
Herbert v. Ferry Co., 107 Mo. App. 287	270
Herdler v. Stove Co., 136 Mo. 16	124
Herdv. Koenig, 137 Mo. App. 589	135
Herman v. Westheimer, 110 Mo. App. 191	359
Herzberg v. Brotherhood, 110 Mo. App. 328	542
Hill v. Butler Co., 195 Mo. 511	281
Hilt v. Hammond, 179 Mo. 406	261
Hinrichs v. Hinrichs, 84 Mo. App. 27	279
Hirch v. Bread Co., 150 Mo. App. 171	135
Hisey v. Charleston, 62 Mo. App. 381	593
Holland v. Railroad, 163 Mo. App. 251	717, 719
Holloway v. Kansas City, 184 Mo. 19	149
Hopkins v. Selvert, 58 Mo. 201	452
Horton v. Insurance Co., 151 Mo. 604	66
Hospital v. Trust Co., 137 Mo. App. 179	675
Hotel Co. v. Furniture Co., 73 Mo. App. 138	104
Howard v. Strode, 242 Mo. 210	218
Hubbard v. Burton, 75 Mo. 65	660
Hubbard v. Insurance Co., 57 Mo. App. 1, 6, 7	307
Huff v. Woodmen, 85 Mo. App. 96	418
Hulett v. Railroad, 80 Mo. App. 87	506
Hunter v. Weston, 11 Mo. 176	496

Hurt v. Railroad, 94 Mo. 255	654
Huss v. Bakery Co., 210 Mo. 44	12
Hutchinson v. Gate Co., 247 Mo. 71	12, 445, 447

I

Imboden v. Trust Co., 111 Mo. App. 220	245
In re Blackburn, 41 Mo. App. 622	167
In re Estate of Catron	675
In re Estate of Soulard 141 Mo. 642	196
In re Gladys Morgan, 117 Mo. 249	165
In re Kohl, 82 Mo. App. 442	166
In re Scarritt, 76 Mo. 565	167
In re Steele, 107 Mo. App. 567	181
In re Whillow, 184 Mo. App. 229	193
In re Williams Estate, 62 Mo. 450	198
Insurance Co. v. Carson, 31 Mo. 218	569
Irmer v. Brewing Assn., 69 Mo. App. 17	432

J

Jacobs v. Life Ass'n., 146 Mo. 523	546
Jackson v. Butler, 249 Mo. 342	134
James v. Life Assn., 148 Mo. 1	74
James v. Muchlebach, 34 Mo. App. 512, 518	110
Jewell v. Nut & Bolt Co., 231 Mo. 176	207
Johnson v. Reading, 36 Mo. App. 315	697
Johnson v. Traction Co., 176 Mo. App. 174	559
Johnson v. Railroad, 243 Mo. 278	413
Johnson v. Grayson, 230 Mo. 380, 403, 407	298
Johnson v. Johnson, 95 Mo. App. 329	279
Johnson v. Nut & Bolt Co., 172 Mo. App. 214	205, 271
Jones v. Insurance Co., 173 Mo. App. 1	245, 392
Joy v. Cale, 124 Mo. App. 569	103

K

Kahn v. Insurance Co., 173 S. W. 695	285
Kane v. Railroad, 251 Mo. 13	473
Kauffman v. Bank, 151 Mo. 65	290
Kayser v. Hinkle, 127 Mo. App. 62	572
Keeline v. Sealy, 257 Mo. 498	404
Keller v. Insurance Co., 198 Mo. 460, 461	285, 392
Kellerman v. Railroad, 136 Mo. 177	684
Kenefick v. Insurance Co., 205 Mo. 294	327
King v. Railroad, 143 Mo. App. 279	207
King v. City of St. Louis, 250 Mo. 501	414
Kirby v. Railroad, 146 Mo. App. 304	650
Klebe v. Distilling Co., 207 Mo. 480	124
Kline v. Vogel, 90 Mo. 239	262
Klosterman v. Loos, 58 Mo. 290	249
Koenig v. Boat Co., 155 Mo. App. 699	462
Koerner v. Car Co., 209 Mo. 141	272
Koerper v. Insurance Co., 102 Mo. App. 543	261
Konta v. Exchange, 189 Mo. 26	198
Kuhn v. McNeill, 47 Mo. 389	359

L

Lachner Bros. v. Express Co., 72 Mo. App. 13, 21	722, 723
Lack v. Brecht, 166 Mo. 242	722
Lackland v. Railroad, 101 Mo. App. 420	717
Land Co. v. Campbell, 65 Mo. 109	615

Landers v. Railroad, 134 Mo. App. 80	446
Lane v. Hyder, 163 Mo. App. 688	570
Lappin v. Crawford, 186 Mo. 462, 471	261
La Rue v. Kempf, 186 Mo. App. 57	413
Lauff v. Carpet Co., 186 Mo. App. 123	8
Laumier v. Halleck, 103 Mo. App. 116	245
Laundry Co. v. Fredenstein, 179 Mo. App. 175	384, 614
Lead Co. v. Lead Co., 251 Mo. 721	9
Lehmann v. Insurance Co., 183 Mo. App. 696	325
Levea v. Railroad, 171 Mo. App. 24	9
Lewine v. Supreme Lodge, 122 Mo. App. 547	91, 95, 541
Lewis v. Carsono, 93 Mo. 587	196
Lewis v. Harvey, 18 Mo. 74	248
Libby v. Railroad, 137 Mo. App. 276	681
Lieber v. Lieber, 239 Mo. 1	612
Lingenfelder v. Wainwright, 103 Mo. 578	260
Link v. Jackson, 158 Mo. App. 63	296
Livery Co. v. Railroad, 113 Mo. App. 144	685
Long v. Moon, 107 Mo. 334	124
Lumber Co. v. Harvester Co., 215 Mo. 221	698
Lumber Co. v. Schwartz, 163 Mo. App. 659	114
Lumber Co. v. Werner, 93 Mo. 374	462

M

Machine Co. v. Blair, 181 Mo. App. 593	698
Mancusco v. Kansas City, 74 Mo. App. 138	506
Manning v. Insurance Co., 176 Mo. App. 678	74
Manufacturing Co. v. Clark, 208 Mo. 108	115
Martin v. Harrington, 147 Mo. 711, 712	693
Martin v. Mitchell, 23 Mo. 50	252
Martin v. St. Louis, 139 Mo. 246	604
Mason v. Deitering, 132 Mo. App. 26	705
Mason v. Railroad, 25 Mo. 473	719
Massey v. Young, 73 Mo. 273, 274	452
Mathews v. Woodmen, 236 Mo. 326	96
Mayhew v. Toddsman, 246 Mo. 288	376
Mesersmith v. Mesersmith, 175 S. W. 914	219
Meyer v. Railroad, 64 Mo. 542	723
Mill Co. v. Sugg, 206 Mo. 155	452
Miller v. United Railways, 155 Mo. App. 528	469
Mocowick v. Railroad, 196 Mo. 550, 571	298
Moran v. Insurance Co., 160 Mo. 407	546
Morgan v. Mining Co., 100 Mo. 118	452
Morris v. Railroad, 228 Mo. 198	264
Morton v. Dry Goods Co., 126 Mo. App. 377	124
Morton v. Royal Tribe, 93 Mo. App. 78	92
Morton v. Supreme Council, 100 Mo. App. 76	90, 95, 541
Mulberry v. Telephone Co., 180 Mo. App. 128	271
Musser v. Johnson, 42 Mo. 74	249

Mc

McBeth v. Craddock, 28 Mo. App. 380	233
McCabe v. Huntersheirs, 7 Mo. 355	226
McClellan, v. Ruprolids, 49 Mo. 312	248
McDaniels v. Railroad, 165 Mo. App. 678	388
McDenworth v. Woodmen, 97 Mo. 636	536
McFadden v. Railroad, 92 Mo. 343	683
McFarland v. Ass'n., 124 Mo. 204, 220, 221	549
McFarland v. Baze, 24 Mo. 156	216
McGee v. Larrimore, 50 Mo. 425	248
McGowan v. Transit Co., 190 Mo., 85	149

McManus v. Burrows, 246 Mo. 438	598
McPike v. McPike, 111 Mo. 216	196
McPike v. Supreme Ruling etc., 187 Mo. 679	542

N

Nagel v. Railroad, 75 Mo. 653	239
Nalley v. Reading, 107 Mo. 350	697
Neely v. Bank, 114 Mo. App. 467	361
Nelson v. Railroad, 176 Mo. App. 423	414, 508
Nelson v. Brown, 140 Mo. 588	694
Nelson v. Railroad, 702 Mo. 88	649
Newman v. Trust Co., 189 Mo. 423	290
Nichols v. Insurance Co., 170 Mo. App. 449, 450	391
Nicholls v. Glass Co., 126 Mo. 55	11
North v. Priest, 81 Mo. 561	198
Nugent v. Milling Co., 131 Mo. 241	135

O

O'Brien v. Heman, 191 Mo. App. 477	504
O'Brien v. Implement Co., 141 Mo. App. 331	207
Oehler v. Fruit Co., 162 Mo. 446	469
Orderheide v. Modern Brotherhood, 158 Mo. App. 677	422
Ormsby v. Insurance Co., 105 Mo. App. 145	326, 539
Orr v. Sanford, 74 Mo. App. 187	261

P

Palmer v. Welch, 171 Mo. App. 580	347
Patrum v. Railroad, 259 Mo. 109	402, 432
Patterson v. Insurance Co., 174 Mo. App. 37	285, 392
Pauley v. Vogel, 42 Mo. 303	361
Payne v. Railroad, 105 Mo. App. 155	143
Payne v. Savings Assn., 126 Mo. 598	360
Pearson v. Indemnity Co., 114 Mo. App. 283	91
Peck v. Harris, 57 Mo. App. 1	695
Phipps v. Phipps, 168 Mo. App. 697	166
Pocock v. Peterson, 256 Mo. 519	368
Porter v. Woods, 138 Mo. 554	115
Pottery Co. Folkner, 131 Mo. App. 105	260
Powell v. Thomas, 7 Mo. 440	248
Powers v. Transit Co., 202 Mo. 280	432
Prewitt v. Martin, 59 Mo. 325, 334	294
Priest v. Watson, 175 Mo. 310	569
Pringle v. Insurance Co., 123 Mo. App. 710	321
Produce Co. v. Gamble-Robinson, 189 Mo. App. 654	461
Pullis v. Investment Co., 157 Mo. 565	225

R

Railroad v. Nortoni, 154 Mo. 142	359
Range Co. v. Mercantile Co., 120 Mo. App. 438	461
Reading v. Railroad, 165 Mo. App. 123	717, 721
Reading v. Railroad, 188 Mo. App. 41	721, 728
Reed v. Bankers Union, 121 Mo. App. 419	391
Reeves v. Lutz, 179 Mo. App. 61	556
Rice v. Railroad, 63 Mo. 314	682
Rice v. Waddill, 168 Mo. 99	245
Rice v. Jefferson, 50 Mo. App. 464	706
Richardson v. O'Connell, 88 Mo. App. 12	197
Richardson v. Ashby, 134 Mo. 238, 249	290
Richmond v. Supreme Lodge, 100 Mo. App. 8	90

Rickroad v. Martin, 43 Mo. App. 603, 604	447
Ringo v. Graham, 67 Mo. 324	250
Ritchey v. Insurance Co., 104 Mo. App. 146	829
Robins v. Latham, 134 Mo. 466	589
Rogers v. Gosnell, 58 Mo. 590	114
Rogers v. Insurance Co., 157 Mo. App. 671, 683	285
Rundelman v. Boiler Co., 178 Mo. App. 647	692
Ruppel v. Assn., 158 Mo. 613, 622	515
Russell v. Lumber Co., 112 Mo. 41	359

S

Saller v. Shoe Co., 130 Mo. App. 712	134
Septouski v. Transit Co., 108 Mo. App. 307	447
Schmidt v. Foresters, 259 Mo. 491	419
Schmidt v. Foresters, 228 Mo. 675	419, 420
Schmidt v. Foresters, 124 Mo. App. 165	418
Schmidt v. Supreme Lodge, 228 Mo. 675	97
Schnetz v. Bailey, 40 Mo. 69	222
School Town v. Kendall, 72 Mo. 91	248
Schuck v. Lawton, 249 Mo. 168	302
Seafeld v. Bohne, 169 Mo. 537	613
Sennith v. Douglass, 178 Mo. App. 664	570
Shamp v. Lambert, 142 Mo. App. 567	143
Shannon v. Shannon, 97 Mo. App. 119	166
Shell v. Insurance Co., 60 Mo. App. 644	326
Shockley v. Fischer, 21 Mo. App. 551	724
Short v. Taylor, 137 Mo. 517	413
Sidway v. Mo., etc. Co., 163 Mo. 342, 376	559
Simpson v. Iron Co., 249 Mo. 376	12
Smith v. Whitman, 13 Mo. 352	722
Smith v. Alexander, 31 Mo. 193	249
Smith v. Supreme Lodge, 83 Mo. App. 512	95
Smith v. Box Co., 193 Mo. 715	135
Smith v. Crane, 169 Mo. App. 695	260
Smith v. Russell, 171 Mo. App. 324	281
Smoot v. Life Ass'n., 138 Mo. App. 438	546, 613
Snider v. Crawford, 47 Mo. App. 8	144, 147
Somer v. Bryson, 168 Mo. App. 335	301
Spickard v. Fire Ass'n., 164 Mo. App. 1	284
Steele v. Ancient Order, 125 Mo. App. 680	695
Steffanson v. Rock Co., 136 Mo. App. 225	270
Stegman v. Gerber, 146 Mo. App. 104	135
Stix v. Indemnity Co., 175 Mo. App. 180	392
Stevens v. Insurance Co., 120 Mo. App. 88	314
Stone v. Stone, 134 Mo. App. 242	279
Storck v. Mosker, 55 Mo. App. 26	261
Stotler v. Railroad, 200 Mo. 107	239
Strange v. Railroad, 61 Mo. App. 586	264
Straus v. Railroad, 86 Mo. 421	649
Straus v. Railroad, 75 Mo. 185	649

STATE

State v. Brand, 153 Mo. App. 27	306
State v. Carson, 231 Mo. 1	306
State v. George, 221 Mo. 519	281
State v. Hellscher, 150 Mo. App. 230	306
State v. Hellscher, 156 Mo. App. 62	306
State v. Humfeld, 182 Mo. App. 639	306
State v. Mathews, 88 Mo. 121, 125	294
State v. Reynolds, 257 Mo. 19	414
State v. Scobee, 255 Mo. 273	281

State v. Stein, 79 Mo. 330, 332	294
State v. Tecters, 239 Mo. 475	446
State v. Wigger, 196 Mo. 90, 98, 100	535

STATE EX REL.

State ex rel. v. Adams	673
State ex rel. v. Bird, 253 Mo. 571	186
State ex rel. v. Chamberlain, 54 Mo. 338	220
State ex rel. v. Clay County, 46 Mo. 731	222
State ex rel. v. Creusbauer, 68 Mo. 254	198
State ex rel. v. Doud v. Leseur, 136 Mo. 452	593
State ex rel. v. Gaslight Co., 102 Mo. 482	114
State ex rel. v. Hope, 121 Mo. 34	722
State ex rel. Knight of Pythias v. Vandiver, 213 Mo. 187	542
State ex rel. v. Musick, 165 Mo. App. 214	411
State ex rel. v. Musick, 145 Mo. App. 33	412
State ex rel. v. Powell, 44 Mo. 436	589
State ex rel. v. Scholl, 47 Mo. 84	196
State ex rel. v. Shipman, 87 Mo. App. 569	198
State ex rel. v. Sly, 180 Mo. App. 379	282
State ex rel. v. Standard Oil Co., 194 Mo. 154, 155	452
State ex rel. v. Thompson, 49 Mo. 188	222
State ex rel. United Rys. v. Reynolds, 257 Mo. 19	508

T

Tate v. Railroad, 64 Mo. 149, 155	506
Tatum v. Davis, 144 Mo. App. 125	187
Taylor v. George, 176 Mo. App. 215	9
Taylor v. Swearingen, 161 Mo. App. 467	360
Tetwiler v. Railroad, 242 Mo. 194	298
Tomlinson v. Ell' on, 104 Mo. 105	245
Toomey v. Knights of Pythias, 147 Mo. 129	542
Troll v. Spencer, 238 Mo. 101, 102	452
Troll v. St. Louis, 257 Mo. 653	452
Trust Co. v. Pagenstecher, 221 Mo. 121	582
Tuck v. Traction Co., 140 Mo. App. 335	446
Turner v. Hunter, 225 Mo. 71	359
Turner v. Land Co., 188 Mo. App. 481	13

U

Ulrey v. Ulrey, 80 Mo. App. 48	240
Ungerer & Co. v. Cheese & Fish Co., 155 Mo. App. 95	23
Union Depot v. St. Louis, 76 Mo. 393	584

V

Valleau v. Newton County, 72 Mo. 593	588
Vanesler v. Cigar Co., 108 Mo. App. 621	134
Van Meter v. Poole, 130 Mo. App. 423	694
Vanneman v. Laundry Co., 166 Mo. App. 685	146
Van Riper v. Insurance Co., 66 Mo. App. 153	724
Vanstandt v. Hobbs, 84 Mo. App. 628	290

W

Wade v. Dry Goods Co., 155 Mo. App. 405	632
Wald v. Wald, 119 Mo. App. 341	240
Walker v. St. Louis, 15 Mo. 563	589
Wallace v. Insurance Co., 174 Mo. App. 110	392
Walsh v. Insurance Co., 162 Mo. App. 546	49

Walther v. Merrill, 6 Mo. App. 370	696
Wares v. Wares, 122 Mo. 129	240
Warehouse Co. v. Railroad, 124 Mo. App. 545	632
Warner v. Railroad, 178 Mo. 134	473
Warner v. Close, 120 Mo. 211	301
Warnke v. Rope Co., 186 Mo. App. 30	134
Warren v. Kavanaugh, 33 Mo. 102	706
Waters v. Herboth, 178 Mo. 166	217
Wear Bros. v. Schmelzer, 92 Mo. App. 314, 323	261
Welmer v. Shelton, 7 Mo. 237	529
Weir v. Lumber Co., 186 Mo. 383	193
Weirmutter v. Scuffin, 203 Mo. 466 ...	612
Wendler v. Furnishing Co., 165 Mo. 537	432
Wendleton v. Kingberry, 110 Mo. App. 67	393
Wheeler v. Bowles, 163 Mo. 398	627
Whimster v. Holmes, 177 Mo. App. 130	108, 143
White v. Insurance Co., 93 Mo. App. 282	332
Whittaker v. Insurance Co., 133 Mo. App. 664	66
Whitworth v. Webb City, 204 Mo. 579	583
Wilcox v. Walker, 94 Mo. 89	359
Wilkerson v. Eilers, 114 Mo. 245, 251	294
Williams v. Insurance Co., 189 Mo. 70, 81	546, 548
Williams v. Insurance Co., 73 Mo. App. 607	326, 329
Williams v. Wall, 60 Mo. 318	290
Williams v. Ransom, 234 Mo. 55	270
Wilson v. Assembly, 125 Mo. 597	542
Wilson v. Drainage Dist., 257 Mo. 266	534
Winfrey v. Mathews, 174 Mo. 713	301
Withers v. Bank, 67 Mo. App. 115	290
Woodmen v. Angle, 127 Mo. 94	539
Wright v. Baldwin, 51 Mo. 272	104

Y

Young v. Railroad, 93 Mo. App. 267	653
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Z

Zellers v. Water Co., 92 Mo. App. 123 127	271
Zimmerman v. Supreme Tent, 122 Mo. App. 591	95

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1915.

(Continued from Volume 190.)

AMELIA DANIELS, Respondent, v. FREDERICK
W. GOEKE et al., Appellants.

St. Louis Court of Appeals. Argued and Submitted April 6, 1915.
Opinion Filed May 4, 1915.

1. **EVIDENCE: Photographs: Sketches.** In an action for the death of an employee from moving shafting in a mill, which was destroyed by fire after the injury, a sketch made from a photograph of the interior of the mill, showing the position of the shafting and the immediate surroundings, which was identified by witnesses as a fairly accurate representation, and was used merely to illustrate their descriptions, and not as independent evidence, was properly admitted in evidence, notwithstanding the fact that the photograph was neither produced nor accounted for.
2. **WITNESSES: Competency: Transactions with Deceased Person: Disinterested Witness.** The inhibition in Sec. 6354, R. S. 1909, against the surviving party to a contract or cause of action, or one claiming under him, testifying, when the other party is dead, applies only to the parties to the contract or cause of action, or those claiming under them, and their

agents and attorneys; and hence, in an action for the death of an employee in a mill, from injuries sustained from moving shafting, it was proper to permit a State factory inspector to testify concerning a conversation he had with the superintendent of the mill, since deceased, relative to the shafting, since the factory inspector was in no way interested in the action.

3. **MASTER AND SERVANT: Injury to Servant: Placing Belt on Moving Machinery: Contributory Negligence.** An employee in a mill, who was killed by being caught while attempting to replace a belt on a pulley, was not guilty of contributory negligence as a matter of law in attempting to replace the belt without stopping the machinery, since that is the method ordinarily employed and it is almost impossible to put a belt on a dead pulley.
4. ———: ———: ———: ———. An employee in a mill, who was killed by being caught while attempting to replace a belt on a pulley, was not guilty of contributory negligence as a matter of law in stepping over the belt, since it did not appear that he could have got around it or under it, and it was necessary for him, in the course of his ordinary duties, to adjust it.
5. ———: **Injury to Foreman: Liability of Master.** Although, to a limited extent, a foreman is considered a vice-principal, he may nevertheless recover for injuries resulting from defective appliances furnished by the master that are not reasonably safe.
6. ———: **Injury to Servant: Choice of Method: Contributory Negligence.** An employee in a mill, who was killed while attempting to replace a belt on a pulley, was not negligent as a matter of law, on the ground that he attempted to replace the belt while the machinery was moving, instead of stopping it, and thus choosing a dangerous, rather than a safe, way to do the work, since where there are two ways of doing the work, one dangerous and the other not so hazardous, both furnished by the employer with the intention that the employee may use either, at his discretion, the employer cannot defeat a recovery for injuries to the employee on the ground that he chose the more dangerous method.
7. ———: ———: **Unguarded Machinery: Question for Jury.** In an action for injuries sustained by a servant from moving shafting in a manufacturing establishment, it is a question for a jury, under Sec. 7828, R. S. 1909, whether the machinery in question could have been safely and securely guarded without materially interfering with its efficiency.
8. ———: ———: ———: **Evidence.** In an action for the death of an employee in a mill from an injury sustained by

being caught by a set screw on moving shafting, the fact that the State factory inspector had called the employer's attention to the screw, and had cautioned him that it was dangerous and should be guarded, several weeks before the injury, while of no force as imposing liability on the employer or as an official notice fixing liability, was of probative value, as tending to show knowledge of the danger by the employer.

9. ———: ———: ———. In an action for the death of an employee in a mill from an injury sustained by being caught by a set screw on moving shafting, evidence *held* sufficient to warrant submission to the jury of the question of whether the set screw could have been or should have been guarded, as required by Sec. 7828, R. S. 1909.
10. ———: ———: ———: **Sufficiency of Guard.** A grain conveyor a few feet in front of shafting, under which an employee had to go to reach the shafting, was not a guard of the shafting, satisfying the requirements of Sec. 7828, R. S. 1909.

Appeal from St. Louis City Circuit Court—*Hon.*
Thomas C. Hennings, Judge.

AFFIRMED.

Ellerbe & Brokaw for appellants; *Lubke & Lubke* of counsel.

(1) The court erred in admitting over the defendants' objection plaintiff's exhibit B, a drawing made from a photograph not offered in evidence. It was not shown when the photograph was taken or when the drawing was made, nor was any one able to state that the drawing was an accurate picture of the coupling and set screws. (2) The court erred in admitting over the objection of the defendants the alleged conversation between the witness Thomas J. Schueddig and the defendants' former superintendent Heitzman. Heitzman being dead Schueddig was an incompetent witness under the proviso contained in section 6354, R. S. 1909, to any conversations or statements passing between him and Heitzman. *Carroll v. Railroad*, 157 Mo. App. 247; *Leavea v. Railroad*, 171 Mo.

App. 24; Taylor v. George, 176 Mo. App. 215. (3) The deceased in attempting to replace the belt on the revolving shaft was not obeying any order of the master and was of his own volition negligently adopting a dangerous rather than a simple and absolutely safe method. He was the *alter ego* the vice-principal, in sole charge of the plant, with authority to pursue any course of action or method he chose. The master should not be held liable for his negligence or his mistake in judgment in selecting an unsafe manner; and the fact that he or others had done the same thing did not relieve him from his responsibility for the results of his voluntary choice of the more dangerous manner. By walking twenty feet and giving the order to shut down the machinery, as he ought to have done, he could have replaced the belt in perfect safety. Smith v. Forrester-Nace Box Co., 193 Mo. 715; Doerr v. Brewing Ass'n, 176 Mo. 547; Trainer v. Mining Co., 243 Mo. 359; Dressie, Admr., v. Railroad, 145 Mo. App. 163; Riegel v. Biscuit Co., 169 Mo. App. 513; Brea-shears v. Iron Works Co., 171 Mo. App. 507. (4) The court erred in not directing a verdict for the defendants, as the evidence conclusively showed that the shafting, coupling and set screws were so guarded that they were not dangerous to the deceased or any of the defendants' employees while engaged in the performance of their ordinary duties. At the time of his death the deceased was not engaged in an ordinary, but in an extraordinary and unusual duty. If the conveyer box on its supports was not a guard, still the shafting was so located that it was not dangerous to the deceased or other of the defendants' employees while any of them were engaged in the performance of their ordinary duties, and therefore the defendants were not required to guard it by section 7828, R. S. 1909. Lang v. Bolt & Nut Co., 131 Mo. App. 146; Strode v. Columbia Box Co., 124 Mo. App. 511; Strode v. Columbia Box Co., 250 Mo. 695; Simpson v. Witte

Iron Works, 155 S. W. 813; Simpson v. Witte Iron Works, 249 Mo. 376; Austin v. Shoe Co., 176 Mo. App. 572; Saling v. American Chicle Co., 117 Mo. App. 374.

Earl M. Pirkey for respondent.

(1) In order for an appellate court to pass on the admissibility and character of evidence, the evidence in question even if real must be before the appellate court. Phelps v. Conqueror Zinc Co., 218 Mo. 581; Scott v. Railroad, 158 Mo. App. 625. (2) (a) To disqualify a witness on the ground that a party to the contract or cause of action is dead, the witness must both be interested and a party to the contract or cause of action with the deceased person. Campbell, Admr., v. Hayden, 164 Mo. App. 252; Investment Co. v. Lead Co., 251 Mo. 741. (b) Where a widow sues an individual for the death of her husband, the cause of action on trial did not accrue until after his death, and all witnesses to what was said and done before his death are competent. Entwistle v. Feighner, 60 Mo. 214. (c) Hearsay testimony carries no weight or probative force whatever, whether objected to or not. Childers v. Pickenpauh, 219 Mo. 436. (3) (a) A foreman may recover in like manner as an ordinary servant, for injuries caused by the negligence of the master. Nichols v. Plate Glass Co., 126 Mo. 66. (b) If there are two ways for a servant to do an act, one more dangerous than the other, both of which are furnished by the master with the intention that the employee may use either, he is not negligent in choosing the more hazardous course. Hutchinson v. Safety Gate Co., 247 Mo. 116. (c) Even where a servant of his own free will chooses an unsafe way when a safer way is at hand, he can recover, unless the way he chose is so glaringly dangerous that no prudent person would have chosen it. Boehm v. General Electric Co., 179 Mo. App. 671; Rhea v. Railroad, 171 Mo. App.

178; *Railroad v. Thompson*, 199 Fed. 395; *American Car and Fdry. Co. v. Ruckle*, 200 Fed. 47. (d) The statute requires machinery to be guarded when it is so placed in a factory that its normal operation would injure any employee who should approach near enough to be caught by its force or subjected to its activity. *Simpson v. Witte Iron Works Co.*, 249 Mo. 389.

REYNOLDS, P. J.—At the time of the accident here involved, defendants, partners, owned and operated a mill for grinding grain of various kinds, manufacturing it into feed. Daniels, the husband of plaintiff, was night foreman. On the night of September 29, 1911, Daniels discovered that a belt had slipped from its pulley and he climbed over a shafting for the purpose of adjusting the belt, the machinery in operation and the shaft, pulley and belting moving at the time. He was accompanied by a laborer who carried a lighted lantern. This shafting was near the south wall of the building, about eighteen inches from it and about two feet above the floor. On the far side of it, toward the interior of the building, was a wooden grain conveyor some two or three feet from the shafting, and raised four or more feet above the floor. Daniels was in charge of the plant that night. The laborer was named Zeva. Daniels stood for awhile on the outside of the shafting. He then got between the shafting and the wall and after making three or four unsuccessful efforts to put the belt back on the revolving pulley, he was stepping over the shafting when a leg of his trousers was caught in a set screw in the moving shaft and he was whirled to his death.

The plaintiff, his widow, brought this action for damages resulting from this death, charging that the defendants had negligently failed to sufficiently light the establishment at and near the coupling and shafting and also had negligently failed to guard the set screws, which were in the coupling or shafting, and

which extended such a distance from the surface of the coupling that there was probable danger of their catching the person and clothing of anyone at or near the coupling. The charge of negligence as to insufficient light was taken from the jury so that the cause proceeded on the assigned negligence in failing to guard the set screw in the shafting, it being claimed that failure to guard it was a violation of section 7828, Revised Statutes 1909, and that Daniels was caught by it while in the performance of the ordinary duties of his employment.

After a general denial, defendants pleaded contributory negligence in that Daniels was familiar with the premises; that he crawled under a guard provided by defendants over the machinery and appliances and had negligently placed his leg and body over a shaft while the same was revolving and negligently attempted to place on the pulley wheel attached to the shafting while it was in motion, the belting which had come off, without first stopping it, as it was his duty to do, as charged, and that he had negligently allowed his leg and trousers to come in contact with and be caught in the revolving shaft.

The answer further attacks section 7828, Revised Statutes 1909, of our State as unconstitutional. This latter defense is not open to our consideration, indeed is not insisted on here by learned counsel for appellants.

The guard referred to as one under which Daniels was alleged to have passed and which it is alleged was provided by the defendants over the machinery and appliances, is the grain conveyor we have referred to.

From a verdict in favor of plaintiff, defendants have duly perfected their appeal to this court.

There are four assignments of error made before us.

The first is to alleged error of the court in admitting, over defendants' objection, an exhibit consisting

of a drawing made from a photograph not offered in evidence, it being charged that it did not appear by the evidence when the photograph was taken or when the drawing was made, nor that anyone was able to state that the drawing was an accurate representation of the coupling and set screws. Our court recently held in *Lauff v. J. Kennard & Sons Carpet Co.*, 186 Mo. App. 123, 171 S. W. 986, that photographs, if properly identified, may be introduced in evidence. The mill at which this accident occurred caught fire and was burned down after the accident, but it appears that before that a photograph had been taken of that part of the interior that contained this shafting. While the photograph itself was neither produced nor accounted for on the trial of the case, what was claimed to be a sketch from that photograph of this shafting, showing its position and immediate surroundings, and the set screw, was in evidence and is the exhibit referred to. It was identified by witnesses as a fairly accurate representation of the *locus in quo*. We see no error in the admission of this in evidence, as the witnesses testifying from it were able to give the court and jury an understandable description of the machinery involved and its situation. In itself it was no evidence and was not so used, but served the purpose of making the verbal descriptions more intelligible. It is not claimed that it was in any respect misleading. We see no error in the action of the court in its admission in evidence.

The second assignment of error is to the action of the court in admitting a conversation between a witness who was a deputy factory inspector and a superintendent for defendants, the latter since dying. This inspector testified that he had called the attention of the superintendent to this set screw and told him it should be covered or countersunk, and that this superintendent told him he would have it remedied. This

conversation took place some three weeks before this accident.

Learned counsel for appellants rely upon *Carroll v. United Rys. Co.*, 157 Mo. App. 247, 137 S. W. 303; *Leavea v. Southern Ry. Co.*, 171 Mo. App. 24, 153 S. W. 500, and *Taylor v. George*, 176 Mo. App. 215, 161 S. W. 1187, in support of their objection, claiming that under the provisions of section 6354, Revised Statutes 1909, as interpreted by these decisions, the superintendent being dead, this deputy factory inspector was an incompetent witness. Section 6354 and its predecessors, as found in the various revisions of our statute, have been frequently before our Supreme Court and the various Courts of Appeals for consideration and construction. The last case in which this section was construed by our Supreme Court, and to which our attention has been called, is that of *Ham & Ham Lead & Zinc Co. v. Catherine Lead Co.*, 251 Mo. 721, 158 S. W. 369. There our Supreme Court has said that in order to render a witness incompetent he must both be interested and a party to the contract or cause of action which was made with the deceased person. Nothing whatever contrary to this is to be found in any of the cases above cited from the appellate courts. While it is true that in all of them, as stated very fully in *Carroll v. United Rys. Co.*, *supra*, it is said that the reason of the rule underlying the statute is that when the mouth of one is closed by death, the other should not be heard to speak, it is distinctly held in all of them, and in every case of which we have any notice or knowledge in our State, that this rule applies to the parties to the contract or to the action; broadened, it is true, to take in their agents and attorneys, but always limiting it, as the statute does, to the parties, or the agent and attorney of the parties, to the contract or cause of action. Our lawmakers have never seen proper to extend this statute so as to close the mouth of a witness to conversations and transac-

tions with another, that other being dead, when the witness himself, or the dead one, is neither a party to the contract or cause of action. We hold this assignment of error untenable.

The third assignment of error is that plaintiff was guilty of negligence as a matter of law and that therefore the court should have directed a verdict for defendants. Reading over the testimony in the case, as presented to us by counsel for appellants, we cannot say as a matter of law that the decedent was guilty of contributory negligence. The question of fact on that was very elaborately and carefully submitted to the jury by instructions given at the instance of defendants, appellants here, and with these instructions and under the evidence we see no reason to disturb that verdict.

It is argued by the learned counsel for appellants in support of their claim of contributory negligence, that decedent, in attempting to replace the belting on the revolving shafting was not obeying any order of the employer and was, of his own volition, negligently adopting a dangerous rather than a simple and absolutely safe method; that it was negligent for him not to have stopped the machinery, which he could have done by walking a few feet and signaling the engineer, before he attempted to put on the belting which had slipped from the pulley. We are unable to see that this established contributory negligence as a matter of law. Answering the point that the pulley should have been stopped before decedent attempted to put on the belting, counsel for respondent in his oral argument before us very aptly, as we think, urged that the common, ordinary and in fact almost necessary way of adjusting belting is to do so when the pulleys are revolving; that it is almost impossible to put a tight belt on a dead pulley.

Nor do we see contributory negligence as a matter of law on the part of the decedent in stepping

over or attempting to step over this shafting. It does not appear that he could get around it or under it, and the evidence tends to show that it was necessary for him, in the course of his ordinary duties and employment, to adjust the belting. To do so, or having done so, he necessarily stepped over this moving shafting and was caught.

It is urged that because Daniels was a foreman and, in a way, a vice-principal, there can be no recovery.

In *Nichols v. Crystal Plate Glass Co.*, 126 Mo. 55, 28 S. W. 991, Judge BLACK, speaking for our Supreme Court, has said (l. c. 66) :

“There is no doubt that the plaintiff was the foreman of the blacksmith shop, and as such had charge of the various jobs of work sent to him. He also had control of his helpers. Though a foreman, and to a limited extent the defendant’s vice-principal, still he was the servant of the defendant. The fact that he was such foreman does not defeat his action to recover for injuries sustained by reason of defective appliances, unless it was his duty to see that the appliances were kept in order, and we have seen that this was a question of fact in this case and not one of law.”

Daniels, even as night foreman, was working with the appliances which his employers furnished him. We know of no case in which it has been held that because of his position as foreman, he lost his right to look to his employer for reasonably safe appliances, or here, for appliances guarded as required by law, with and about which to do his work.

It is further argued in support of the contention that contributory negligence here appears as a matter of law, that decedent had a safe way to do this work of putting on this belting; that he might have stopped the engine, stopped the running of the pulley and so operated in safety to himself. In addition to what we have before said about the impracticability of put-

ting a belting on a dead pulley, we have it distinctly announced in *Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71, l. c. 116, 152 S. W. 52, as a rule settled by repeated decisions of our Supreme Court, "that where there are two ways by which the servant may do a particular thing, one dangerous and the other not so hazardous, both, however, furnished by the master, with the intention that the employee may at his discrimination use either, then it does not lie in the mouth of the former to say to the latter that he cannot recover because he chose the more hazardous way."

We do not think this third assignment of error is tenable.

This brings us to the real and controlling point in the case, and that is the fourth assignment of error made by learned counsel for appellants, to the effect that appellants had complied with section 7828, Revised Statutes 1909, in so guarding the shafting that it was not dangerous to employees while engaged in the performance of their ordinary duties; that if not guarded within the meaning of that statute the shafting was so located that it was not dangerous to employees while engaged in their ordinary work and hence defendants were not required to guard it. On these two propositions really hinges the determination of this case.

Our Supreme Court has held in several cases, particularly in *Huss v. Heydt Bakery Co.*, 210 Mo. 44, 108 S. W. 63, commencing at page 50, that the question of whether the machinery in question could have been safely and securely guarded without materially interfering with the efficient working of the machinery, is a question of fact for the determination of the jury. This point in the *Huss* case is reaffirmed by our Supreme Court in *Simpson v. Witte Iron Works Co.*, 249 Mo. 376, l. c. 386, 155 S. W. 810, and is dwelt upon by Judge LAMM in his dissenting opinion in that case.

In the case at bar the evidence of the assistant factory inspector, before referred to, introduced as a witness, not only to prove the conversation, but as an expert in matters of this kind, is distinct that this set screw could have been countersunk, or that a boxing could have been put over it in such a way as to prevent this accident and remove danger from the projecting screw head. That was substantial evidence for the consideration of the jury on that point and there is no real contradiction of it. This witness further testified, and this is the testimony which appellants claim was improperly admitted, as we have above noted, that he had called the attention of the superintendent to the presence of this screw head or set screw and cautioned him that it was dangerous and should be guarded. While our Supreme Court has held in the Simpson case, *supra*, as well as in other cases, that notice by the factory inspector of the necessity of guarding machinery in whole or in part is not a prerequisite to the right to maintain a civil action, that testimony is significant in this case and here of importance, in that it brings home a knowledge to the employers, owners and operators of the machinery, of the danger attendant upon leaving this particular piece or part of the machinery unguarded. So that while here of no force as imposing liability, and as an official notice fixing liability, it is of probative value as tending to show notice and knowledge on the part of the owners of the present danger of leaving this shafting and this set screw unguarded.

Our Supreme Court and this court, have, in many cases, considered this section 7828 of our statutes and have construed it as requiring machinery of like character to be guarded. [See *Austin v. Bluff City Shoe Co.*, 176 Mo. App. 546, 158 S. W. 709, and the more recent case of *Turner v. Tyler Land & Timber Co.*, 188 Mo. App. 481, 174 S. W. 184, for a collection of the most recent and leading cases on this. In the

light of what we have said and the cases we have cited in these cases, we do not think we can add anything new or of service. We refer to them.

In brief, we here hold that, under the evidence in this case, this set screw was a part of the machinery which could have been and which should have been guarded, and that for the lack of its being guarded the husband of respondent came to his death while engaged in his ordinary duties, he then being employed in and about the establishment of appellants. His duty there was to see that the machinery was in order; that it operated; that the belting and shafting were in place. So he came to his death while in the discharge of his ordinary duties. There was no guard or safety device of any kind on or immediately about this shafting. The grain conveyor referred to was some few feet away from the shafting. To get to the shafting the workman was obliged to stoop under this conveyor, but when inside of it, between it and the shafting, there was no protection of any kind against the shafting itself or its screws or projections. As the jury found, here is where safety appliances were required; here they could have been placed without interfering with the working of the shafting. Their absence was the direct cause of the fatal accident, as the jury must have found.

This covers all the assignments of error which are made by the learned counsel for appellants.

Examining the abstract of the testimony in the case, considering the instructions which were given on behalf of defendants, and the ruling of the court in the admission of evidence, we find no reversible error.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

WOLDERT GROCERY COMPANY, Appellant, v.
ISAIAH PILLMAN et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted April 5, 1915.
Opinion Filed May 4, 1915.

1. **SALES: Refusal to Accept Goods: Assignment of Reasons.** A buyer having more than one reason for rejecting the goods does not, by assigning one reason, conclusively admit that there is no other, and he may justify his refusal on another ground.
2. ———: **Contracts: Construction: Question for Court.** The construction of a contract of sale, evidenced by correspondence between the parties, is for the court.
3. ———: **Place of Delivery.** Parties bargaining for a delivery of goods and mentioning no place of delivery are presumed to intend delivery at the place of business of the seller or where the articles sold are situated, and a delivery at any other place is not a good delivery.
4. ———: ———: **Performance of Contract.** A wholesale dealer in fruit distributed circulars headed with its name, dated at the place where it did business, and advising the trade that it had strawberries to offer in car lots, that it was the sales agent of a growers' union controlling most of the berries in the vicinity of the place of business, and that it had engaged a certain person to do inspecting. A buyer, being advised of the market price, ordered a carload by telegram, addressed to the dealer at its place of business, and the dealer answered from there, accepting the order. *Held*, that the buyer could assume that he was buying strawberries produced in the vicinity of the place where the circular was dated, by local growers there, and that the berries would be shipped from that place, and that, before shipment, the berries would be inspected by the inspector named in the circular; and the dealer, in shipping berries produced elsewhere, from another point, and inspected by another, did not comply with the contract, and the buyer was justified in rejecting the shipment.
5. ———: ———: **Customs and Usages: Rejection of Evidence.** In an action for the purchase price of perishable goods which the buyer refused to accept, defendant set up as a defense that, inasmuch as the contract was silent concerning the place of delivery, delivery should have been made at the seller's place of business, and was not made there, but was attempted to be made elsewhere. Plaintiff asked a witness if he was "familiar

with the custom of the trade as to where goods are shipped from by the general produce man, when he makes an order from his central place of business, as to whether it is the custom to ship all the goods from the central place of business or whether he ships from other places." The court, in sustaining an objection to the question, remarked that there might be a state of facts that would justify the conclusion that a person is bound by custom, but such a state of facts had not been shown. Plaintiff offered no further testimony to meet the suggestion of the court. *Held*, that the court did not err in sustaining the objection.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

James F. Conran, John L. Corley and Edgar P. Holly for appellant.

(1) The telegrams constitute a contract for the sale by plaintiff and the purchase by defendant of one carload of strawberries. *Elam v. Telegraph Co.*, 113 Mo. App. 588; *Reynolds v. Telephone Co.*, 81 Mo. App. 223; *Thompson v. Thorne*, 83 Mo. App. 241; *Fruit & Trading Co. v. McGuire*, 81 Minn. 232. (2) The strawberries were properly shipped, and were of the kind and quality ordered and were in good merchantable condition. (3) Delivery of the strawberries by plaintiff to the common carrier, properly consigned to the defendants, was constructive delivery to the defendants. *Fruit & Trading Co. v. McGuire*, 81 Minn. 232; 1 *Benjamin on Sales*, secs. 127, 144, 147; *Gates v. Carquenez*, 78 Cal. 439; *Lord v. Edwards*, 148 Mass. 476; *Comstock v. Affoelter*, 50 Mo. 411; *Graff v. Foster*, 67 Mo. 512; *Scharff v. Meyer*, 133 Mo. 428; *Baker & Son v. McKinney*, 87 Mo. App. 361; *Bloom & Co. v. Haas*, 130 Mo. App. 122; *Calhoun v. Paule*, 26 Mo. App. 282; *Waples v. Overacker*, 77 Tex. 11; *Woods v. Half*, 44 Tex. 636; *Craig v. Marx*, 65 Tex. 654; *Gulf Ry. v. Brown*, 66 S. W. 341; *Story on Sales* (4 Ed), secs. 306,

308; Tiedeman on Sales, sec. 96; Benjamin on Sales (5 Ed.), p. 682; 35 Cyc., p. 172; 24 Am. & Eng. Ency. of Law (2 Ed.), p. 1069. (4) Delivery of the strawberries to the carrier at Lindale was a constructive delivery to the defendants. *Baker & Son v. McKinney*, 87 Mo. App. 361; *Baird & Bros. v. Pratt & Co.*, 6 Ind. Ter. 38; 35 Cyc., p. 172; *Mobile Fruit Co. v. McGuire*, 87 Minn. 232; *Cohen v. Plute*, 69 N. Y. 348; *Nelson v. Trading Co.*, 125 Pac. 777; *Warehouse, etc. Co. v. Toomy*, 144 Mo. App. 516; *Salmon v. Box Co.*, 147 Fed. 408; *Harper v. State*, 121 S. W. 737; *Cureton v. State*, 136 Ga. 91; *Swanke v. McCarty*, 81 Wis. 109; *Sarbecker v. State*, 65 Wis. 174. (5) Rejection of the berries on the specific ground that the berries were "too bad," was a waiver of other grounds for rejection. At least it is prima-facie evidence that defendants did not object to the shipment from Lindale. *Littlejohn v. Shaw*, 159 N. Y. 189; *Gunn v. Coal Co.*, 106 N. W. 867; *Fruit Co. v. Roberts Co.*, 8 Pa. Prep. Ct. 506; *Keswick v. Rafter*, 165 N. Y. 653; *Ungerer Co. v. Maul C. & F. Co.*, 134 S. W. 56. (6) The court erred in rejecting evidence to prove the custom and usage of trade in the produce business, governing place of shipment to fill orders to ship produce. *Taylor v. Bailey*, 169 Ill. 181; *Cook on Corp.*, p. 115; *Meechim on Sales*, sec. 175; *Lillard v. Ky. Dis. & W. Co.*, 134 Fed. 168; 2 *Elliott Const.*, sec. 1710; *Sontica v. Kellermann*, 18 Mo. 509; *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67. (7) Upon a breach of a contract of sale by the vendee the vendor may at once, or within a reasonable time, resell the property and recover the difference between the contract price and the net amount realized upon the resale, provided he gave due notice to the vendee of his intent to resell. *Oehler v. Fruit Co.*, 162 Mo. App. 446; *Logan v. Carroll*, 72 Mo. App. 613; *Rickey v. Tenbroech*, 63 Mo. 563; *Olsen v. Hirsch & Sons Co.*, 102 Mo. App. 513; *Baker & Sons v. McKinney*, 87 Mo. App. 316;

Van Horn v. Reicker, 33 Mo. 319; Anderson v. Frank, 45 Mo. App. 486; Ingram v. Matthews, 3 Mo. 209; Williston on Sales, Sec. 546; 2 Schouler Personal Property (3 Ed.), par. 546; Story on Sales, par. 314; Benjamin on Sales (5 Ed.), p. 957. Mobile Fruit Co. v. McGuire, 81 Minn. 232; Waples v. Overacker, 77 Tex. 11; Wilson v. Gregory, 84 Pa. 356; Wrigley v. Cornelius, 162 Ill. 92.

Dawson & Garvin for respondents.

(1) The petition, in substance and legal effect, alleges that the place of delivery of carload lot in question was Tyler, Texas, and that the berries were delivered there. The burden was on plaintiff to prove that the carload lot was delivered there, and as it failed to do so, the nonsuit was proper. *Norrington v. Wright*, 115 U. S. 209; *Filley v. Pope*, 115 U. S. 220; *Janney v. Sleeper*, 30 Minn. 474; *Lodwick Lumber Co. v. E. A. B. Lumber Co.*, 35 Okla. 797. (2) The plaintiff's offer in this case was not of indeterminate strawberries, but of a certain kind of berries; and was an offer of strawberries by description, namely, strawberries raised around Tyler, Texas, and which had been inspected by a certain named inspector, namely, the "Produce Reporter Company;" and as the berries in question admittedly were raised around Lindale, Texas, and had never been inspected by the "Produce Reporter Company," defendants never became bound to receive them. *Norrington v. Wright*, 115 U. S. 209; *Ungerer & Co. v. Cheese & Fish Co.*, 155 Mo. App. 105; *Allan v. Lake*, 18 Q. B. (N. S.) 560; *Benjamin on Sales* (5 Ed.), pp. 607-612; 2 *Mechem on Sales*, secs. 1210, 1211; *Baird Bros. v. Walter Platt & Co.*, 6 Ind. Ter. 38. (3) The business between plaintiff and defendant in this case having been conducted wholly by correspondence, the question is one of construction and therefore one of law for the court, not of fact for

the jury. Benjamin on Sales (5 Ed.), p. 684. (4) The court construing the telegrams which passed between appellant in Tyler, Texas, and respondents in St. Louis, Missouri, on April 28, 1906, in connection with appellant's letter of April 7, 1906, and subsequent undisputed transactions correctly interpreted appellant's telegram as an offer to sell a carload of choice to fancy Klondike strawberries raised around Tyler, Texas, by the Tyler Fruit and Truck Growers Union and inspected by the Produce Reporter Company, which had been shipped from Tyler, Texas, and was then rolling at one dollar and seventy cents per crate, and another like car to be shipped from Tyler, Texas, that day, namely, April 28, 1906, on same terms as formerly, namely, cash there or bank guarantee; and interpreted respondents' telegraphic answer as an acceptance of the offer as made. Benjamin on Sales (5 Ed.), p. 681. (5) As the only performance shown by appellant of the said contract on their part was directing Frank M. Boyd at Lindale, Texas, by long-distance telephone, between five and six o'clock on the afternoon of said Saturday, April 28, 1906, to deliver Pillman Brothers in St. Louis, A. R. T. car 10799, then being loaded with berries grown around Lindale, Texas, by the Lindale Fruit Growers and Shippers Union, which was being inspected by John Stewart, an employee of said Boyd, as secretary and manager of said union, and which car did not leave Lindale until the afternoon of the next day, namely, April 29, 1906, the court properly instructed the jury at the close of plaintiff's case that under the pleadings and the evidence plaintiff (appellant here) could not recover. *Ungerer v. Cheese & Fish Co.*, 155 Mo. App. 95; *Filley v. Pope*, 115 U. S. 213; *Nelson v. Imperial Trading Co.* (Wash.), 125 Pac. 777; *Van Valkenburg v. Gregg*, 45 Neb. 654; *Milner v. Somerset, Etc., Lumber Co.* (Ky.), 51 S. W. 615; *Lodwick Lumber Co. v. E. A. B. Lumber Co.*, 35 Okla. 797. (6) Defendants properly presumed that they

were buying from the sales agent and general manager of the Tyler Fruit and Truck Growers Union choice to fancy Klondike strawberries raised around Tyler, Texas, inspected by the Produce Reporter Company and to be shipped on that day, April 28, 1906, from Tyler, Texas, on one of the four fruit trains leaving Tyler between six and eleven o'clock Saturday night and due to arrive on regular schedule in St. Louis within thirty-six to forty hours, that is on Monday, April, 1906; and they were not bound to receive from any other person strawberries grown elsewhere and inspected by some other person and shipped from some other place on some other day, and which did not arrive in St. Louis until Tuesday, May 1st, and then in a rotten condition. *Lewis v. Thomas*, 14 Mo. App. 581; *Arkansas Smelting Co. v. Belden*, 127 U. S. 387; *Nelson v. Imperial Trading Co. (Wash.)*, 125 Pac. 777; *Smith v. Shell*, 82 Mo. 218. (7) If delivery or shipment is not made in accordance with the terms of the contract it is not considered that the delivery to a common carrier is made to the buyer's agent and the title and risk remain in the seller. 24 Am. & Eng. Ency. Law (2 Ed.), p. 1071, and cases cited; *Benjamin on Sales* (5 Ed.), pp. 737, 738; *Filley v. Pope*, 115 U. S. 213; *Janney v. Sleeper*, 30 Minn. 473; *Lodwick Lumber Co. v. E. A. B. Lumber Co.*, 35 Okla. 797. (8) Defendants assigning one reason instead of another for their refusal to accept the strawberries did not do away with the necessity on the part of the plaintiff of showing a performance of their undertaking on their part in order to recover. *Hayden v. Grillo*, 26 Mo. App. 289; *Ungerer v. Cheese & Fish Co.*, 155 Mo. App. 95; *Van Valkenburg v. Gregg*, 45 Neb. 654. (9) To make relevant evidence of any custom or usage of trade it must be pleaded, and certainty, generality, fixedness and uniformity are essential elements of custom which form part of a contract, and it can never contradict, destroy or modify language which is other-

wise plain. *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67; *Lillard v. Ky. Dis. & W. Co.*, 134 Fed. 168.

REYNOLDS, P. J.—Action by plaintiff, a corporation, appellant here, against the defendants, partners, to recover \$788.40, with interest and costs, the cause of action, as averred in the petition, being upon a contract under the terms of which it is alleged plaintiff agreed to sell and deliver to defendants, “on board cars at shipping point,” a carload of strawberries at a price named. Alleging fulfilment of the terms of the contract on its part and that it had delivered to defendants “on board cars” a load of merchantable strawberries of the kind and grade ordered and that defendants had accepted, received and agreed to pay for them, plaintiff avers that on the arrival of the car of berries at St. Louis, defendants having refused to pay for them, plaintiff had taken possession of the berries, sold them for the best price obtainable and credited defendants on the purchase price with \$27.60, the amount so received. Judgment is asked for the balance of the purchase price.

The answer was general denial.

At the close of the testimony offered by plaintiff, defendants asked the court to instruct the jury that under the pleadings and evidence plaintiff could not recover and that their verdict should be for defendants. The court having heard arguments on this motion, announced that it had reached the conclusion that it should be given. Whereupon plaintiff took a nonsuit with leave to move to set it aside. That motion being overruled, plaintiff duly perfected its appeal to our court.

While there are other questions as to the quality of the berries and their condition when shipped presented, the real point turns on the question of the place of delivery contracted for by the parties, defendants claiming that the contract called for delivery at Tyler,

Texas, when, as the evidence shows, the delivery claimed to have been made was at Lindale, Texas. That, indeed, is the only point in the case necessary to its decision.

In sustaining the motion for a directed verdict, the court said that he had reached that conclusion for the reason that "the facts in the case are such that I do not think that the defendants can be held to have agreed to accept this carload of berries at Lindale." If this view which the learned trial judge took of the contract is correct, the judgment of nonsuit must stand, and the motion of the plaintiff to set the nonsuit aside was properly overruled.

It appears by the evidence in this case that the berries were loaded in a refrigerator car on the International & Great Northern Railroad at Lindale, a point about thirteen miles from Tyler, on the 28th of April, 1906, and from there consigned to defendants at St. Louis. There is but one train carrying fruit or refrigerator cars from Lindale to St. Louis, that train leaving Lindale between six and seven o'clock in the evening, going thence by the International & Great Northern Railroad to Troupe and Longview, and from there by the Texas & Pacific Railroad to Texarkana, and from Texarkana via the St. Louis, Iron Mt. & Southern Railroad to St. Louis. There were three fruit trains from Tyler over what is known as the Cotton Belt, going direct from Tyler to Texarkana and thence to St. Louis. The time over either route from Tyler, or for that matter from Lindale, was about the same, that is between thirty-six and forty hours, provided that the loading at Lindale was in time to have the car go out on the only fruit train that left there during the twenty-four hours. This particular car of berries was not loaded in time to catch the train from Lindale on the evening of the 28th, and did not leave there until the evening of the 29th, and instead of arriving at St. Louis on the 30th of April, as it

would have done if sent on the 28th of April from either Tyler or Lindale, it arrived in St. Louis on the 1st of May, the strawberries in unmerchantable state, as the evidence of plaintiff itself shows.

It appears that the price was "f. o. b. cars," that, as we understand, meaning that when loaded on cars, the berries were to be treated as the property of the buyer and there delivered to it.

The reason assigned at the time by the defendants for refusing to accept the shipment was the condition of the berries, it being claimed that as it appeared that the car had been properly iced during the whole period that the berries were in it, that they were so defective when shipped that for that reason, and by reason of the delay of some twenty-four hours, they had become worthless. At the trial, however, the defense relied upon, as developed by the testimony of plaintiff itself, turned more on the fact that the contract of the parties required the delivery on car at Tyler and that delivery having been made at Lindale instead of Tyler was not a delivery under the contract. It was on this theory that the trial court sustained the motion of defendants which drove plaintiff to a non-suit.

At the outset we might as well dispose of the contention of the learned counsel for appellant, that respondents are confined to the cause of rejection which they originally made and cannot now set up a different cause. In a very carefully considered case where this precise question was involved, our court held that a buyer having more than one reason for rejecting goods does not, by assigning one reason, conclusively admit that there is no other and may justify his refusal to accept the goods on another ground; that it did not do away with the necessity on the part of plaintiff of showing a performance of an undertaking in order to a recovery. [Ungerer & Co. v. Louis Maull Cheese & Fish Co., 155 Mo. App. 95, 134 S. W. 56.] This disposes of

the contention of counsel for appellant on that proposition adversely to that contention.

As the transaction between plaintiff and defendants was conducted wholly by correspondence, the legal effect of that correspondence—the construction of it—was one of law for the court, not of fact for the jury. The court construed the correspondence between the parties as calling for delivery on board cars to defendant at Tyler, Texas, and therefore held that delivery at Lindale, Texas, was not a delivery within the terms of the contract. So, as before noted, the question is, was the court correct, under the evidence, under the correspondence showing the contract, in the conclusion at which it arrived?

The petition in the case is silent as to the place where delivery was to be made, but it is set out in the preamble, or as matter of inducement, that the plaintiff is a corporation duly incorporated and engaged in the produce business "at Tyler, in the State of Texas." Then follows the averment that the parties had entered into a contract by the terms of which plaintiff agreed to sell and deliver to defendants on board cars at shipping point, one carload of strawberries. It will be noted that neither the place at which the contract was made nor the place of delivery agreed upon, nor the shipping point are set out.

Learned counsel for respondents contend that in substance and in legal effect, this petition alleges the place of delivery to be Tyler, Texas; that the berries were to be delivered there, and following this, they contend that the burden is on plaintiff to prove that the carload lot was delivered there, and that having failed to do that the instruction for a nonsuit or demurrer was proper. Whether the petition is to be interpreted as fixing the place of delivery at Tyler, the home place of business of plaintiff, we need not determine. But that the place of delivery is the place of business of the seller, unless more appears, seems

clear and is distinctly defined in the English Sales Good Act of 1893 (56 and 57 Victoria, chap. 71). By section 29 of that act it is provided: "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence, provided that, if the contract be for the sale of specific goods which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery."

This seems to have been the rule before and independent of that Act. Referring to it as in force before this Act, Mr. Benjamin, at section 682 (Bennett, 6th Am. Ed.) has said:

"As to the *place* where delivery is to be made, when nothing is said about it in the bargain, it seems to be taken for granted almost universally that the goods are to be at the buyer's disposal, at the place where they are when sold." The author then quotes 2 Kent's Commentaries (12 Ed.), p. 505, to the effect that "if no place be designated by the contract, the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand and is silent as to the place."

We think we are safe in saying that this is the general rule of law; that parties bargaining for a delivery and mentioning no place of delivery are presumed to intend delivery at the place of business of the seller, or where the articles sold are, and a delivery at any other place is not a good delivery. So the

Supreme Court of the United States held in *Hatch v. Oil Company*, 10 Otto 124, l. c. 134.

In *Norrington v. Wright*, 115 U. S. 188, p. 209, that court quotes with approval this from Lord Blackburn in *Bowes v. Shand*, 2 App. Cas. 455:

“If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it.”

So in *Filley v. Pope*, 115 U. S. 213, the Supreme Court of the United States has said (l. c. 220):

“The thing sold and described in the contract, is ‘500 tons No. 1 Shott’s (Scotch) pig iron,’ to be shipped ‘from Glasgow as soon as possible.’ It is not merely 500 tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality to be shipped from the particular port of Glasgow as soon as possible. The court has neither the means, nor the right, to determine why the parties in their contract

specified 'shipment from Glasgow,' instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But it does not take the risk of delay or of sea perils which may occur in course of the different voyage from Leith to the same destination."

So, also, it is held by the Supreme Court of Minnesota in *Janney v. Sleeper*, 30 Minn. 473, where at page 474, it is said:

"If no place be designated by the contract, the general rule is that the articles sold are to be delivered where they are at the time of the sale. . . . This rule is not changed by the fact that plaintiffs did not have the goods on hand at their place of business at the time of the sale, but had to procure them elsewhere in order to fulfill their contract. Potentially and prospectively the goods were as if then situate in their store at Minneapolis. Hence, in the absence of any evidence as to the place of delivery, it would be presumed to be at Minneapolis. To overcome this presumption, some evidence would be required tending to show that some other place was agreed upon."

So that, irrespective of the averments, or lack of averments in the petition, of a place of delivery, and granting that we are not to indulge in the presumption that merely because the place of business of the plaintiff named in the petition is Tyler, Texas, that it follows from that averment that the delivery was to

be made there, the question recurs on the evidence as to what the contract between the parties was as to place of delivery, and whether that evidence warranted the trial court in holding, as a matter of law, that delivery, or place of shipment was to be Tyler, Texas.

It appears that preliminary to the ordering of this particular carload of strawberries that plaintiff had sent out a circular letter to the trade concerning their business of dealers in fruit, this circular headed with the name of the plaintiff, describing it as an incorporated company and as pecan exporters, wholesale grocers, fruit and produce shippers. It is dated "Tyler, Texas, April 7, 1906," and is headed "Strawberries" and proceeds:

"Gentlemen:

Our strawberry season will begin about April 20th, and we wish to remind the trade that we will have Klondike Berries to offer in straight car lots; however, about three-fourths the acreage here are Lady Thompsons. We are the sales agents and General Managers of the Tyler Fruit & Truck Growers Union. This Union controls most of the berries, potatoes, tomatoes and peaches raised around Tyler and we can supply your wants on short notice.

"Our terms this season will be the same as in former years, 'cash here or bank guarantee,' and to those who have never done any business with us, we invite you to look us up and make inquiry as to who we are, our responsibility, and whether you can count on getting a square deal or not. We have engaged the Produce Reporter Company to do all our inspecting here, and you can depend on getting the exact grades you buy whether your representative is on the ground or not."

It appears that before the transaction as to the particular car of berries here involved, defendants had ordered one or more cars that season from plain-

tiff over which no dispute arose. Defendants then ordered another car by wire, and plaintiff accepted the order by wire, defendant's wiring to plaintiff at Tyler, plaintiff answering from there. No details beyond price and quantity are in these messages.

It does not appear that any preliminary or other correspondence took place between the parties other than by this circular and by these telegrams. On or about April 28, 1906, defendants being advised of the market price of this particular quality of strawberries at that date, ordered a car from plaintiff. That is all of it. No other communication. From these, defendants had a right to assume that they were not only buying strawberries produced in the vicinity of Tyler by local growers named, and that they were to be of a certain kind and quality, and that before shipment the berries were to be there inspected by the fruit inspectors named in this circular letter, but that they were to be delivered to them and shipped from Tyler. In point of fact the car in controversy was bought by plaintiff from another concern at Lindale, the berries grown by a different party than the one named, and the car billed from Lindale to defendants at St. Louis, the berries inspected at Lindale, and as the evidence tends to show, very imperfectly, by a farmer, who had very little experience in the matter of inspecting and who was acting for an inspecting concern other than the one named in the circular. It is clear from all the testimony in the case, that neither the conditions as to the origin of the berries, their inspection and as to the point of delivery, as set out in the trade circular, were complied with by plaintiff.

A point is made by counsel for appellant on the action of the trial court in excluding a line of testimony offered. After having introduced the evidence as to the contract and the transaction, plaintiff introduced a witness whom it asked if he was "familiar with the custom of the trade as to where goods are

shipped from by the general produce man, when he makes an order from his central place of business, as to whether it is the custom to ship all the goods from the central place of business or whether he shipped from other places." This was objected to as incompetent, irrelevant and immaterial. The court sustaining that said: "You cannot vary it by custom." Whereupon counsel for plaintiff said that he understood the law to be that "where a man enters into a certain kind of business he adopts the customs and the rules of that business and does business according to the rules and customs that prevail in that kind of business." To which the court answered: "There might be a state of facts that would justify that conclusion, but it has not yet appeared here. You have not produced a state of facts yet that would justify the court in permitting that testimony to go in." To this ruling plaintiff excepted. This was the end of the offer with respect to proof of custom, the plaintiff not following it up by any offer of testimony to meet the suggestion of the court. We see no error in the ruling of the court on this.

Without discussing other points suggested, our conclusion is that there is no error in the action of the learned trial judge in sustaining the demurrer to the testimony and in refusing to set aside the nonsuit. The testimony conclusively shows that delivery at Tyler, of Tyler grown berries, to be inspected at Tyler by local inspectors there, were bargained for. Defendants were not bound to accept delivery of any substituted berries, or of berries delivered at a different point.

The judgment of the circuit court is affirmed. *Nor-toni* and *Allen, JJ.*, concur.

GEORGE E. EGGER, Appellant, v. CHARLES A.
WILCOX, Respondent.

St. Louis Court of Appeals. Submitted on Briefs April 5, 1915.
Opinion Filed May 4, 1915.

1. **CONTRACTS: Action for Breach: Sufficiency of Evidence.** In an action for damages for the breach of a contract, it was shown that defendant contracted to convey to plaintiff certain real estate subject to two deeds of trust, one of which was to secure an indebtedness of \$1000, less forty dollars, which had been paid, payable at the rate of forty dollars per month, but that the deed of trust was actually given to secure eleven notes for forty dollars each, due monthly, and one note for \$560, due in twelve months. Plaintiff testified that, upon discovering the true facts respecting the maturity of the indebtedness, which was after the deed conveying the property subject to the deeds of trust had been made and after he had paid one or more of the forty dollar notes, he refused to pay any more of the notes, because of his inability to handle the \$560 note at maturity, and the deed of trust was foreclosed and the property sold; but it was shown that a certificate of title, showing the true facts respecting the indebtedness, was delivered to plaintiff or his agent, before the deed was made. *Held*, that these facts warranted a finding that there was no breach of contract by defendant.
2. **APPELLATE PRACTICE: Conclusiveness of Findings.** In an action at law tried to the court, the appellate court is bound by the trial court's finding on all questions of fact, if supported by substantial evidence and in accordance with the law.

Appeal from St. Louis City Circuit Court.—*Hon.*
Daniel D. Fisher, Judge.

AFFIRMED.

*Henry B. Davis, Charles Erd, Carlisle Durfee and
Loren E. Massey* for appellant.

(1) Where, in an action for the recovery of damages for the breach of a contract, the execution of the contract and its breach are admitted by the defend-

ant, even in the absence of evidence showing any substantial damages resulting from such breach, the law presumes that there was damage, and it is the duty of the trial court to render judgment in favor of the plaintiff for nominal damages. *Lampert v. Drug Co.*, 119 Mo. App. 693; *Halliday v. Lesh*, 85 Mo. App. 285, 289; *Fulkerson v. Eads*, 19 Mo. App. 620; *Lampert v. Drug Co.*, 238 Mo. 409, 415. (2) In an action for the recovery of damages for the breach of a contract, where the uncontradicted and unimpeached evidence discloses that plaintiff has lost property as the result of such breach, the measure of his damages is the value of such property, and the plaintiff is entitled to judgment for the value thereof, as shown by the evidence. *Kirkpatrick v. Downing*, 58 Mo. 32; *Hartzell v. Crum*, 90 Mo. 629; *Matheny v. Stewart*, 108 Mo. 73; *Kyle v. Hoyle*, 6 Mo. 526; *Scuder v. Waddington*, 7 Mo. App. 26; *Hayes v. Connolly*, 12 Mo. App. 595. (3) A person induced to buy land, by reason of false representations of the vendor, may recover damages from the latter, although he relied also on information from other sources. *Bicraft v. Grist*, 52 Mo. App. 586. (4) When one makes a representation where he has no knowledge whether it is true or false, he affirms its truth, and is guilty of fraud if it be false. *Miller v. Ranken*, 136 Mo. App. 426; *Chase v. Rusk*, 90 Mo. App. 25; *Judd v. Walker*, 215 Mo. 312, 325; *Mires v. Summerville*, 85 Mo. App. 183. (5) A party defrauded in a transaction, on discovery of the fraud, may stand by the contract, and sue for damages resulting from the fraud and deceit. *Shinneberger v. Shelton*, 41 Mo. App. 147; *Owens v. Rector*, 44 Mo. 389; *Parker v. Marquis*, 64 Mo. 38; *Campbell v. Hoff*, 129 Mo. 317. (6) The gist of an action founded on fraudulent representations, when damage results, is the fraud of defendant, and when it appears that a representation is made which is known to be false at the time it is made, and the person to whom it is made relied upon it, and was deceived

thereby, to his injury, an action lies against the party making such false representation. *Dulaney v. Rogers*, 64 Mo. 201. (7) A person signing a contract is conclusively presumed to know its contents, and to accept the same, and all prior negotiations are merged in the writing; but fraud cannot be merged, and may be shown to have been the inducement for entering into the contract. *Leicher v. Keeney*, 98 Mo. App. 394. (8) Where it is sought to hold a principal responsible for his agent's fraud, it is immaterial that the principal never authorized the agent to practice the fraud. *Phipps v. Mallory Com. Co.*, 105 Mo. App. 67.

Frank H. Haskins for respondent.

(1) The deed of trust on the property corresponded with the deed of trust described in the contract, so that there was no breach of contract. (2) Even if there was a variation between the deed of trust on the property and the one described in the contract, the variation was so insignificant and immaterial that there was a substantial compliance with the contract so that no breach could be claimed. *Nelson v. Mitchell*, 38 Mo. App. 321; *Hovey v. Pitcher*, 13 Mo. 191. (3) Variations in a contract which were treated at the time as immaterial by both parties will not afterward be treated as departures from the contract. *Wilkey v. School Dist.*, 25 Mich. 419. (4) Where a party knowingly acquiesces in a deviation from a contract, he waives a strict performance and estops the person acquiescing from objecting to the change. *Pike v. Nash*, 40 N. Y. (1 Keyes) 335; *Keating v. Korfbags*, 88 Mo. 524; *Minor v. Edwards*, 12 Mo. 142. (5) Where plaintiff accepts a substituted performance differing from the original contract it will discharge the contract. *Rucker v. Harrington*, 52 Mo. App. 495. (6) Even if a party at the time of accepting a defective title, did

not know of the defect but subsequently discovers it and does not within a reasonable time, make any objection to the defect, such acts are a waiver of the defect. *Minor v. Edwards*, 12 Mo. 142. (7) Whether a new agreement has been substituted for an old one and then operates as a rescission or discharge of it must be determined by the intention of the parties as shown by their conduct. *Rogers v. Rogers*, 139 Mass. 440. (8) A writing complete in itself, without ambiguity, will supersede a prior written contract relating to the same subject-matter. The deed accepted by plaintiff was a contract which superseded the original contract. *Howard v. Scott*, 98 Mo. App. 509; *Chrisman v. Hodges*, 75 Mo. 413; *Munford v. Wilson*, 15 Mo. 540; *McClurg v. Whitney*, 82 Mo. App. 625. (9) Appellant's only allegation of damage, by reason of the deed of trust, is that the property was sold for a default in payment of the \$560 note. There is absolutely no evidence to support this allegation.

REYNOLDS, P. J.—By his petition in this case plaintiff avers that defendant, in consideration of the transfer to him by plaintiff of certain real estate in Pulaski county, Missouri, and other valuable considerations, had, on or about July 20, 1910, agreed to convey to plaintiff certain improved real estate in the city of St. Louis described, the latter subject to a first deed of trust of \$4000, “and a second deed of trust of \$1000, payable \$40 per month, on which \$40 has been paid, which said deeds of trust plaintiff agreed to assume.”

There is a further allegation that the defendant had guaranteed that the property was rented by bonafide tenants but that this was not the fact. As this issue disappeared from the case it is unnecessary to notice it any further.

Charging that defendant did not convey the St. Louis property with the incumbrances thereon as in

the contract stated, but "that there was a payment of \$560 due on said property, or to become due shortly after said contract was entered into on said second deed of trust, and that the owner and holder of said deed of trust sold said property, in default of said \$560 payment, so that the property was wholly lost to plaintiff," plaintiff avers that he has been damaged in the sum of \$1700 for which he asks judgment.

The answer, after a general denial, avers that plaintiff had full knowledge of the dates of maturity of the several notes secured by the deed of trust described in his petition and the amounts thereof before the property was conveyed to him and before he parted with the consideration thereof, and that plaintiff had accepted the property and held the same without objection after he had full knowledge of the dates, maturity and amounts of the notes.

A reply denying this affirmative matter was filed.

A jury having been waived, trial was had before the court, the court finding for defendant and rendering judgment accordingly, from which, interposing a motion for new trial and excepting to the action of the court in overruling it, plaintiff has duly perfected his appeal to our court.

Learned counsel for the respective parties have filed very elaborate briefs but the case really lies within a very narrow compass. It appears that the parties, through their respective agents, having negotiated for the exchange of the property, signed a written contract for that purpose, of date July 20, 1910, in which contract it is recited that the city property which defendant proposed to convey to plaintiff for the country property was subject to two deeds of trust, the first for \$4000, the second for \$1000, "payable \$40 per month, of which \$40 has been paid," which the plaintiff agreed to assume and pay. It is over this statement that the second deed of trust for \$1000 was "payable \$40 per month," that the controversy really

arises. But as to this recital in the contract, there is evidence tending to show that after the execution of this contract, the agent of defendant gave to either plaintiff or his agent a certificate of title issued by a title investigating company, which showed title down to June 16, 1910, on that date, June 16, 1910, to be vested in defendant, subject to certain restrictions set out in the reported deed and clear of lien, "except deed of trust dated January 26, 1908, recorded in Book 2211, page 1, and given to trustee of Leo A. Hackmann, to secure one note for \$4000, at three years, and six interest notes for \$120 each, due one every six months. Deed of trust dated June 10, 1910, filed for record June 13, 1910 (daily No. 74), and given to trustee of Christian H. Prior, to secure eleven notes for \$40 each, due in from one to eleven months, and one note for \$560, due in twelve months, with six per cent interest from date. Subject to above deed of trust." This certificate of title was given to plaintiff or his agent, as there is evidence tending to prove, to have the examination of the title brought down to the date of acquisition of title by plaintiff. Subsequent to the making of the contract of July 20, 1910, the parties went on with the trade, the plaintiff conveying the country property to defendant, and defendant, by general warranty deed of date August 3, 1910, conveying the city lots to plaintiff, it being recited in this deed, however, that the conveyance was made "subject to the conditions and restrictions now of record; also this conveyance is made subject to a deed of trust to secure the payment of \$4000, and the interest to accrue thereon, also subject to a second deed of trust to secure the payment of \$1000 and the interest to accrue thereon, now of record, which the purchaser assumes and agrees to pay."

Plaintiff testified that he did not understand that this \$1000 indebtedness was represented by eleven notes of \$40 each and by one note of \$560, the latter maturing according to its terms one year from June

10, 1910, but thought that all of the payments were to fall due at monthly periods and were for \$40 each. It is true plaintiff testifies that he thought all the unpaid notes were for \$40 each, maturing monthly, but we fail to find any evidence even tending to show that defendant or his agent said or did anything to mislead plaintiff as to this. The debt, as he knew, was \$1000, and due one year from June 10, 1910; at \$40 a month it was impossible to pay off the \$1000 in a year. Plaintiff testifies that after he acquired the property and found that this \$560 note fell due on the 10th or 11th of June, 1911, that he was unable to handle the property or do anything with it, and he thereupon, after having paid one or more of the \$40 notes, failed to pay any of the other \$40 notes. It was for default in payment of two of the notes that the property was sold under the provisions of the deed of trust of May 29, 1911. At this sale it was struck off to defendant for \$798. The defendant testified that he made this purchase to protect himself against the \$4000 deed of trust which was a prior incumbrance. It appears also that from the time of the execution and delivery to the plaintiff of the deed to the city property by defendant, he had been in possession of it and had collected rents.

On reading and on consideration of the testimony in the case as presented in the abstract, we are unable to see that plaintiff made out his case. The certificate of title which was given to him, or to his agent, contained sufficient data to advise him of where the two deeds of trust which were involved were recorded, their amounts, and it is distinctly stated in that certificate that the second deed of trust is for \$1000, evidenced by eleven notes of \$40 each, and one for \$560, the latter maturing one year from its date, June 10, 1910. There is no testimony which tends to show any fraud or imposition practiced upon plaintiff by defendant, or by defendant's agent, in fact none is

charged, the case proceeding mainly on the theory of lack of knowledge by plaintiff of the maturity of the \$560 note and hence inability to protect the property from the lien, and loss of the property. The case, as noted, was tried by the court as a jury and on all questions of fact we are bound by his decision, if supported by substantial evidence and in accordance with the law. Considering the evidence, we are led to conclude that if accepted by the trial court, it does support his finding and we are unable to see any error to the prejudice of plaintiff in the application of the law to the facts. We see no legal ground on which to reverse the judgment.

The learned counsel for appellant argues with great earnestness that even if plaintiff was not entitled to substantial damages, there was such a breach of the contract shown as to entitle him to at least nominal damages. We cannot concur in this view of it. There was evidence from which the trial court was warranted in finding that there had been no breach of contract by the defendant. If that was so, plaintiff was not entitled to even nominal damages.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

JENNIE PFEIFER, Respondent, v. SUPREME
TRIBE OF BEN HUR, Appellant.

St. Louis Court of Appeals. Submitted on Briefs April 5, 1915.
Opinion Filed May 4, 1915.

1. **LIFE INSURANCE: Sufficiency of Proof of Death: Circumstantial Evidence.** In an action on a life insurance policy, where there was evidence tending to show that, at a certain time and place, insured was shot and killed, although his body was never seen or identified by any one who was acquainted with him, it was not necessary to a recovery that plaintiff prove

Pfeifer v. Supreme Tribe of Ben Hur.

that efforts were made to locate insured, as would be required if the unexplained disappearance of insured for the statutory period were relied on as proof of death.

2. ———: ———: ———. In an action on a life insurance policy, evidence held sufficient to warrant the jury in finding that insured was killed at a certain place and time, although his body was never seen or recognized by any one thereafter.
3. ———: ———: Evidence. In an action on a life insurance policy, where the evidence as to the death of insured is circumstantial, evidence of the character and habits of insured and of his affection for his family is admissible as tending to show lack of motive for desertion.
4. TRIAL PRACTICE: Demurrer to Evidence: Rules of Decision. In determining whether defendant's demurrer to the evidence should be given, plaintiff is entitled to the benefit of all the inferences which the jury can legitimately and properly draw from the evidence.
5. LIFE INSURANCE: Sufficiency of Proof of Death: Circumstantial Evidence. In an action on a life insurance policy, where the evidence of the death of insured is circumstantial, the fact that the body was never seen or identified by any one who was acquainted with insured does not preclude the jury from drawing an inference of death from such evidence.
6. ———: ———: ———: Instructions. The evidence, in an action on a life insurance policy, was sufficient to warrant a finding that insured died as a result of a gunshot wound inflicted on the date specified in the petition. His body was never seen or identified by anyone who was acquainted with him. At the instance of plaintiff, the court charged the jury that, in order to entitle plaintiff to recover, she must prove to the satisfaction of the jury, by a preponderance, or greater weight, of the evidence, that insured died on or about the date specified in the petition, "but the fact or time of his death may be established by circumstances, in the absence of direct and positive evidence," and that there was no evidence of any person who saw and identified the body of insured after such date, and, therefore, in determining whether he died on or about such date the jury should take into consideration the particular circumstances of his disappearance, his character, habits, relations and conduct with and toward his family at home, and, from all such facts and circumstances in evidence, if they believed that his absence from his home and family for any cause other than his death was improbable, their verdict and finding on the issue of his death should be in favor of plaintiff. Held, that the instructions correctly declared the law.

7. **APPELLATE PRACTICE: Conclusiveness of Verdict.** A verdict supported by substantial evidence is conclusive on the appellate court.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

AFFIRMED.

Karl M. Vetsburg for appellant.

(1) The demurrer to the evidence offered by appellant should have been sustained. *Bradley v. Modern Woodmen*, 146 Mo. App. 428; *Walsh v. Insurance Company*, 162 Mo. App. 553; *Biegler v. Supreme Council*, 57 Mo. App. 419; *Modern Woodmen v. Gerdum*, 2 L. R. A. (N. S.) 809; *Hitz v. Ahlgren*, 170 Ill. 60; *Modern Woodmen v. Graber*, 128 Ill. App. 585; *Bailey v. Bailey*, 36 Mich. 184; *McNulty v. Mitchell*, 84 N. Y. Supp. 89. (2) A presumption of death cannot arise unless diligent search and inquiry for the missing person has been made. Same cases as point 1.

Jno. B. Dempsey for respondent.

Death, like any other fact, may be established by circumstantial evidence, when direct evidence is not attainable; and when absence without tidings concurs with other attendant and supporting circumstances to produce the conviction that the party is dead, such proof is all that can be required. 3 Bacon, Benefit Societies and Life Insurance, sec. 470. The presumption of death may arise from circumstances of disappearance and being brought in contact with specific perils. *Lancaster v. Washington Life Ins. Co. of New York*, 62 Mo. 121. Facts and circumstances relating to the character, habits, conditions, affections, attachments, prosperity and objects in life which usually control the conduct of men, and are the motives of their actions,

are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence. A rule excluding such evidence would ignore the motives which prompt human actions, and forbid inquiry into them in order to explain the conduct of men. *Tisdale v. Connecticut Mutual L. Ins. Co.*, 26 Iowa, 170; *Fidelity Mutual Life Ins. Co. v. Mettler*, 185 U. S. 308; *Northwestern Mutual L. Ins. Co. v. Stevens*, 71 Fed. 258. The presumption of continued life of the insured after December 24, 1911, is overcome not only by his character and habits, but also by the facts and circumstances attending his actions upon the day in question as well as by the fact of a specific peril shown by the evidence. In fact the testimony of Harry Pfeifer is so strong as to need only the production of the dead body of his father to establish death beyond cavil. The circumstances of Louis Pfeifer's disappearance not only tend to prove his death, but they tend to prove that he was killed, and the jury might legitimately infer that his death was a murder—that he was shot and killed. *Supreme Council v. Boyd* (Ind. App. Ct.), 37 N. E. 1105. The sufficiency of presumptive proof of death at common law depends upon the facts of each case and the rule requiring diligent search and inquiry as one of the conditions necessary to establish death from an absence of seven years does not apply where the man was last seen in a position of peril. And furthermore if the defendant wished the jury to pass upon the question of whether diligent search had been made it was for it to request said instruction. This it did not do and it ought not now to be heard to complain. *Biegler v. Supreme Council of Am. Legion of Honor*, 57 Mo. App. 419.

REYNOLDS, P. J.—This action was begun on August 21, 1912, on a benefit certificate issued by defendant, a fraternal beneficiary association organized under the laws of the State of Indiana and authorized

to do buisness in this State under our laws relating to such associations. The certificate was issued to one Louis Pfeifer as a member of the order, and under it, if he died while a member in good standing, the order contracted to pay to his widow, plaintiff here, the sum of \$900. Alleging that Louis Pfeifer died on December 24, 1911; that at the time of his death he was a member in good standing of the defendant order; that plaintiff is the widow and the person mentioned in the certificate as the beneficiary; that she had complied with all the requirements of the certificate of membership and had demanded payment of the sum mentioned in it, and that it had not been paid, plaintiff demanded judgment for the amount.

The answer was a general denial.

It was admitted at the trial of the case that defendant was incorporated as alleged and that while defendant denied that the member was dead, it admitted that plaintiff had filed with it proofs of loss as required by the benefit certificate.

On the trial of the cause before the court and a jury, the testimony of plaintiff herself was to this effect: She and Louis Pfeifer were married in 1879. They had six children, all living, the youngest, Harry, about twenty-one years of age in June, 1913. Her husband's health was generally good. He was a carpenter by trade and worked steadily at that trade during the summers. They had never had any domestic trouble of any kind. He was of good disposition and cheerful; loved his family; spent his leisure time evenings and Sundays at home; attended lodge meetings, his wife sometimes accompanying him. During the last six or seven years he had spent his winters down south, in part for pleasure and in part for what he could earn by hunting and fishing. His family were raised and he thought he was entitled to spend his winters in this way. His wife occasionally accompanied him. There was never any disagreement between them about

his making these trips in the winter. He made these trips in what was called a "Joe" or a "John" boat, which he built himself, and which appears to have been a boat square at both ends and in which he would drift down the river. His youngest son, Harry, had accompanied him on many of these trips for the last five or six years. While he was on these trips she heard from him sometimes every five weeks, sometimes oftener; more frequently the son wrote, keeping her informed of her husband's whereabouts, except when they were changing from one place to another. When her husband went away on these trips he made provision for the support of his wife during his absence. His trips were not for money making but for pleasure, she repeated, and her husband had never absented himself for any length of time without letting her know where he was. She had not heard from him since December 24, 1911.

On cross-examination plaintiff testified that her husband had always made provision for her; that she was not compelled to work to support herself and family unless she felt like it, although she worked occasionally to get a little extra spending money. They were very poor people and sometimes she wanted things she could not get with the money her husband had given her and she worked for those; also worked to pay the premiums on the insurance. At the time her husband left for this trip south, there were no disagreements or misunderstandings between them. She had not seen her husband nor his body since December 24, 1911.

The son of the parties, Harry Pfeifer, testified that his father was a carpenter; that he, the son, would be twenty-one years old in June, 1913. He had lived at home with his parents, who always got along well together and had no trouble that he knew of. His father had always treated his children nicely, stayed at home, working steadily and providing for his wife and for this son, who appear to have been the only

members of the family living at home, although they had six children. Harry (this witness) had gone to school until he was fourteen years of age. After that he had worked. His father worked all summer at his trade as a carpenter, providing for his wife. When he went on these trips south he left money to keep her through the winter. On the trips south when Harry, the son, accompanied him, the father made just enough to provide for living by fishing and hunting. The last time his father left home was in September, 1911. The son, Harry, left with his father on this trip. There was not a word of any quarrel or dispute between his father and mother. They seemed to hate to part. While on these trips Harry and his father would write home and wait for answers which would generally take three, four or five weeks. They wrote as soon as they received an answer to their letters from his mother. When moving from one place to another they would write to his mother and tell her not to answer because they were going to move but to wait until they wrote again. His father was a peaceable man. They always kept to themselves; did not bother anybody or have quarrels with anybody; his father always tried to make fun and make the trip as happy as he could, earning just enough to keep them through the winter. They usually came back on the train on money that his father had made trapping and hunting. When he got home his father, after he had been home a day or two, settled down to work. He was not a drinking man. Witness had never seen him take but one or two drinks; never saw him drunk. The last time Harry saw his father alive was on the evening of Sunday, December 24, 1911. He and Harry were then on the Arkansas side of the Mississippi River, opposite Catfish Point, in Mississippi. Arkansas City was the nearest town and that was twelve or fourteen miles down the river. There was a man in the neighborhood where they stopped named Henning. His father had worked for him two

or three days and he owed his father money. Across the river at Catfish Point there is a shanty boat and a house below "about two or three blocks." The shanty boat was occupied by a man and a woman but he did not know who lived in the house.

The places around there were not settled, it being a wild country. This last time Harry saw his father was on this Sunday when his father was going across the river to collect money that a man named Ross owed Henning. Henning and Ross had had trouble, so that Henning would not go across the river for his money. Henning owed his father some money and Pfeifer and his son had had no trouble with Ross or anyone else down there. Henning told his father that he thought he, Pfeifer, could get the money from Ross and could pay himself out of the money Henning owed him. So his father took Henning's skiff and went across the river. When he reached the other side the witness (Harry), as he testified, saw two "fellows" run out and fire two shots and he heard his father groan. Harry could see his father until the latter got almost to the other side of the river. Harry had a pair of field glasses and looked through them. He could not see what became of his father when he reached the other side. The shore on the other side was a bluff bank. The last he saw of his father, he was about ten or fifteen yards below where the shanty boat was located. It was foggy below that bluff bank and there was a kind of fog over the water. His father was crossing over under this bluff bank and the fog prevented him from seeing him any further. The shanty boat was from twenty to twenty-five feet above the level of the river on this bluff. It was after Harry lost sight of his father that he saw these "fellows" on the bank start running but did not know who they were. They started scrambling around on the bank, then went into the shanty boat—went in and out. It was hard to say from where he stood whether they had anything in their

hands, but when his father was trying to touch the bank Harry heard two shots and saw the smoke right at the spot below the shanty boat around where these men were; heard his father "holler and groan," but could not make out what he said and did not hear anything more; never saw his father afterwards. He remained opposite Catfish Point until the following Tuesday. He could not go over the river to find out what had happened, because he could not handle their boat on account of the rough water and the wind. Henning's skiff was never returned to his side of the river. Witness never saw it again. When his father left to go across the river in Henning's skiff he had his gun with him, a ten bore double-barreled shotgun. Witness testified that he got this gun from a man who had charge of a flatboat in Arkansas City but did not know the name of the man. This gun was his father's gun, the same gun he had when he left witness opposite Catfish Point, and the point where the man had the gun which he gave to witness was on the Mississippi shore, opposite Arkansas City. He had never found any trace of his father afterwards; never saw the skiff in which he went across the river again, and had never heard of his father since then. It was about three o'clock in the afternoon when his father left to go to Catfish Point.

On cross-examination he repeated this testimony with no particular change except going more particularly into the description of the locality, and saying that the river there was something over a mile wide. He testified that he had not crossed the river after his father crossed. He was then nineteen or twenty years of age, had chills and malaria at the time and could not handle their boat to get across. He could not get his boat away on account of the waves and the high wind; could not get to Arkansas City by land because a creek "cuts behind there; we were surrounded by water," and could not then float down stream to Ar-

kansas City on account of the condition of the wind and waves. He stayed where his father had left him for two days. He identified the gun which had been given to him at Arkansas City by its appearance. While he could not remember the number of the gun he knew by looking at it that it was his father's gun; there was not a gun in the south like it that he had ever seen. There was a bullet mark on the gun when he got it that was not on it when his father took it with him that day; did not know the name of the party from whom he got the gun after this 24th of December; it was from a man on "this willow flat" whose name he did not know; did not know how the gun had got down opposite Arkansas City; did not know who took it down there or how it got there, as he had not seen it taken down. He had never seen his father's body since that 24th of December, 1911, dead or alive.

One Wilson, whose deposition was read in evidence, testified that in December, 1911, he was staying across the river opposite Arkansas City, at a landing known as Hard Baggen. On or about the 25th or 26th of December, 1911, two men came to where witness was camped. He did not know their names. They were in a skiff and were towing another skiff. In this skiff which they were towing was the body of a dead man whom witness did not know and could not tell how long he had been dead. They also found in the skiff a number ten bore double-barreled shotgun, both barrels loaded. Witness testified that he judged from the condition of the man's face that he had been shot. There were holes in the boat where the bullets went through the side of it. The holes looked like they had been made by good sized shot. To the best of his recollection the dead body remained there in this skiff two days and two nights. There was a high wind which kept the boats rocking and the holes in this boat caused it to leak and the next morning this boat in which the body had been turned over and the body was gone.

On cross-examination this witness deposed that he had never before met the men who brought this body there and had never met them since; did not know the name of the man whose body was in this skiff; did not, of his own knowledge, know how the man came to his death; examined the body closely enough to say that he could swear that death was caused from a gunshot wound. The holes in the boat were caused by gunshot. He found nothing on the body or in the boat containing it that would lead to the identification of the corpse; did not know what had become of the body.

Other witnesses testified as to the character of Mr. Pfeifer; that he was jovial and pleasant with his family; very industrious, always spent his evenings and Sundays at home; his disposition toward his children was very friendly and he was not addicted to drink. This evidence was by witnesses who testified that they had visited the Pfeifer home frequently, their birthdays coming close together, and they often celebrated them together.

At the conclusion of the testimony for plaintiff, the certificate being admitted calling for the payment of \$900 to plaintiff on receipt of proofs of the fact and cause of death of Louis Pfeifer, its genuineness being admitted, plaintiff rested.

Whereupon defendant asked the court to instruct the jury that under the pleadings and evidence offered by plaintiff, their verdict must be for defendant. The court refused to give this and defendant offering no testimony, the cause was submitted to the jury on instructions asked by plaintiff to the following effect:

First, that in order to entitle plaintiff to recover in this case, she must prove to the satisfaction of the jury and by a preponderance or greater weight of the evidence that Louis Pfeifer, her husband, died on or about the 24th of December, 1911, "but the fact or time of his death may be established by circumstances

in the absence of direct and positive evidence." The jury were further told in this instruction that in the case before them there was no evidence of any person who saw and identified the body of Louis Pfeifer after December 24, 1911, and therefore in determining whether he died on or about December 24, 1911, the jury should take into consideration the particular circumstances of his disappearance, his character, habits, relations and conduct with and toward his family at home and from all such facts and circumstances in evidence, if they believed that his absence from his home and family for any cause other than his death was improbable, their verdict and finding on the issue of the death of Louis Pfeifer should be in favor of plaintiff.

Another instruction was given as to the amount of recovery, if the finding was for plaintiff.

The jury returned a verdict in favor of plaintiff for the amount claimed and interest.

Filing a motion for new trial and excepting to that being overruled, having also saved exceptions to the action of the court in overruling the demurrer to the evidence and in giving the instructions, defendant has duly perfected its appeal to our court.

This is not a case of an effort to recover for death, the fact of death resting on the presumption of unaccounted absence from this State for seven years or more. Hence cases like *Biegler v. Supreme Council of American Legion of Honor*, 57 Mo. App. 419; *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428, 124 S. W. 69; *Walsh v. Metropolitan Life Ins. Co.*, 162 Mo. App. 546, 142 S. W. 815, and *Modern Woodmen of America v. Gerdorn*, 72 Kan. 391 (as also notes to the latter in 2 L. R. A. (N. S.) 809), relied upon by the learned counsel for appellant, which hold it necessary to recovery in case of unexplained disappearance for the statutory period to show efforts made to find

and locate the party who was claimed to be dead, are not applicable. Here there is no unaccountable disappearance for seven years relied upon. The case proceeds on the theory that the insured was killed on a day named. So the jury were to pass on the testimony adduced to support that theory and such inferences as could legally follow. They were not to found their verdict on a presumption of death which arises from continued and unexplained absence for seven years or more but on evidence of death at the time named and at a given place.

There is this to be said, however, as to the absence of evidence as to a thorough search. First, these people, the plaintiff and her family, were poor people and without means to make anything like a thorough investigation. In the next place, the facts as known to them, accepting their evidence, were such as to render a search as for a missing man unnecessary. His family relations were of the very best; he was a kind and loving husband and father; industrious, sober, cheerful, fond of his home. His son saw him leave in a skiff to cross the river, on a rather thankless errand, that is to collect money from one man, due to another, these two not on good terms. He went in a skiff of the creditor to the vicinity of the debtor—this on a foggy day when he could possibly have been mistaken for the creditor by the debtor. The son saw the father attempt to land, heard the shots, heard his father cry aloud and saw no more of him. All that his father had with him was his gun. Two or three days afterwards the son recovered this gun—from whom does not appear. He waited around there for two or three days, prevented by the condition of the river from moving sooner, with no boat at hand but an unmanageable scow or flat boat, fit only to drift, and then floated down to where he undoubtedly received this gun of his father, and while he did not testify to any conversation between him and the man who had seen the dead body in

the skiff, he had every reason to suppose it was that of his father and that further search was unnecessary.

We have set out substantially all the evidence as to the fact of death, as also the substance of the evidence which plaintiff saw fit to introduce as tending to rebut any presumption of an intentional desertion or absconding of the member from his home and family. This latter class of evidence has probative force, as showing any lack of motive and in that view is relevant here. But the case really turns upon the weight which the jury gave to the evidence of death at the time and place. The question is, was it sufficient to warrant the jury to find actual death, at a given time? On consideration of defendant's demurrer to the evidence, on which demurrer defendant rested, the plaintiff is entitled to claim the benefit of all the inference which the jury can legitimately and properly draw from the evidence. The fact that this evidence of death then and there is circumstantial and that the dead body—the *corpus delicti*, if we may use that phrase in this connection—is not accounted for, does not destroy the inference of death which may be drawn from the evidence, and we cannot say that on this evidence, as produced, the jury were not warranted in drawing the inference of death as occurring under the circumstances stated and at the time and place as testified. The instructions given by the court at the instance of plaintiff are correct as to the law and fitted the facts in the case. We see no reason for complaint with respect to them on the part of defendant, appellant here. There was substantial evidence of the fact of death warranting the submission of the case to the jury; its finding on this concludes us.

Finding no reversible error, the judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

GUSTAVE SCHULER, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 7, 1915.
Opinion Filed May 4, 1915.

1. **LIFE INSURANCE: Laws Governing.** A life insurance policy issued by a foreign corporation, which is negotiated in this State, with a resident and citizen of this State, is delivered here, and the premiums on which are collected here, is a Missouri contract and subject to its laws.
2. ———: ———: **Erroneous Admission of Evidence: Harmless Error: Appellate Practice.** In an action on a life insurance policy issued by a foreign corporation, but which, by reason of having been issued in this State to a citizen of this State, etc., was subject to the laws of this State, it was error to admit in evidence a law of the State in which the company was organized, which required the policy to contain the entire contract between the parties and provided that nothing should be incorporated therein by reference to any application or other writing not indorsed upon or attached to the policy when issued; but such error was not prejudicial to the company, since the effect of that law is the same as Sec. 6978, R. S. 1909, requiring insurance companies to attach to every policy and to indorse thereon the substance of the application on which such policy was issued and which is made a part of the contract of insurance, or referred to therein, or which may in any manner affect the validity of the policy.
3. **APPELLATE PRACTICE: Erroneous Admission of Evidence: Harmless Error.** The erroneous admission of evidence will not work a reversal, where the party complaining of its admission could not have been prejudicially affected by it.
4. **LIFE INSURANCE: Failure to Attach Application to Policy: Applicability of Statute to Foreign Corporation.** Sec. 6978, R. S. 1909, requiring insurance companies to attach to every life insurance policy, or endorse thereon, the substance of the application on which it was issued, applies to a company conducting business in this State, although it was organized under the laws of another State.
5. ———: ———: **Effect.** While the failure of a life insurance company to attach to, or endorse on, a policy the substance of the application on which it was issued, as required by Sec. 6978,

R. S. 1909, does not invalidate the policy, such failure precludes the company from introducing the application in evidence to support its defense of misrepresentations therein, although the statute fixes no penalty for failure to observe it.

6. **LAWS: Rights not Predicable on Disobedience.** One who fails to obey the law cannot base any right on such disobedience.
7. **LIFE INSURANCE: Action on Policy: Conclusiveness of Verdict.** In an action on a life insurance policy, where there was testimony for plaintiff that the answers of insured to the examining physician differed from those written down by the physician, a verdict finding for plaintiff on that evidence is conclusive, on appeal.
8. **APPELLATE PRACTICE: Conclusiveness of Verdict.** A verdict rendered on conflicting evidence is conclusive, on appeal, where the jury are properly instructed as to the law.
9. **TRIAL PRACTICE: Weight of Evidence: Questions for Jury.** The determination of what weight is to be given the evidence is a question for the jury.
10. **APPELLATE PRACTICE: Review: Weight of Evidence.** An objection that the verdict is against the weight of the evidence is for the consideration of the trial court, not the appellate tribunal.
11. **LIFE INSURANCE: Failure to Attach Application to Policy: Effect.** Where, in an action on a life insurance policy, the application for the policy was erroneously admitted in evidence, because not attached to, or endorsed on, the policy, as required by Sec. 6978, R. S. 1909, it was not error to exclude answers propounded to the examining physician based on the application.
12. **———: Trial Practice: Reception of Evidence: Discretion of Court.** In an action on a life insurance policy, defended on the ground of misrepresentation in the application, where the examining physician had been allowed to testify generally that the answers of insured to the questions asked him were as written by him in the application, it was within the discretion of the trial court to refuse to permit a separate examination as to each question and answer appearing in the application.
13. **WITNESSES: Competency: Transactions with Deceased Agent: Appellate Practice: Harmless Error.** In an action on a life insurance policy, evidence of a conversation between insured and the agent who solicited the insurance is not admissible against the company, after the death of the agent, under Sec. 6354, R. S. 1909; but the erroneous admission of such evidence may be harmless where it is merely cumulative and is only brought in casually.

14. **APPELLATE PRACTICE: Erroneous Admission of Evidence: Harmless Error.** In an action on a life insurance policy, the erroneous admission in evidence of a conversation between insured and a deceased agent of insurer was not prejudicial to defendant, where it was merely cumulative to other evidence of the same fact testified to beyond question, and was brought in only casually.
15. **LIFE INSURANCE: Misrepresentation in Application: Instructions.** In an action on a life insurance policy, defended on the ground of misrepresentation in the application, *held* that it was proper for the court to modify instructions requested by the defendant, directing a verdict for it, under certain hypotheses, by adding thereto, "unless the jury find that defendant waived the truth of the representations made by insured."
16. ———: **Vexatious Refusal to Pay: Instructions.** In an action on a life insurance policy, where the court instructed the jury that if the refusal of the company to pay was vexatious—that is, without reasonable cause—they might allow interest and a reasonable attorney's fee, it was not error to refuse a requested instruction further defining "vexatious," since the instruction given sufficiently defined that term.
17. **INSTRUCTIONS: Refusal: Covered by Other Instructions.** It is not error to refuse an instruction which defines a term used in the instructions, where that term is correctly defined in other instructions given.
18. **LIFE INSURANCE: Examining Physician: Agency.** A physician who examines an applicant for life insurance at the instance of insurer is an agent of insurer.
19. ———: **Misrepresentation in Application: Instructions.** In an action on a life insurance policy, defended on the ground of misrepresentation in the application concerning the health of insured, an instruction that if the jury found that the insured, or any one for her, made known her condition to an agent, or superintendent, or examining physician, or if such agent, superintendent, or medical examiner knew of such fact, his knowledge would be the knowledge of the company, and, if the company with said knowledge issued and delivered the policy, it waived the defense, was not erroneous, as imputing to the company the knowledge of every agent it might have, where the evidence showed that the agents who had such knowledge were the examining physician and the assistant manager or superintendent.
20. **INSURANCE: Knowledge of Agent: Effect.** The knowledge of the local agent who negotiates an insurance policy is the knowledge of the company, notwithstanding a contrary provision in the application or policy.

21. **INSTRUCTIONS: Credibility of Witnesses.** Where there is a sharp conflict in the testimony of the witnesses as to a material fact, it is proper to give the ordinary instructions as to the credibility of the witnesses, although no witness was impeached by evidence of bad reputation for truth or veracity.
22. **INSURANCE: Vexatious Refusal to Pay: Attorney's Fee: Sufficiency of Evidence.** In an action on an insurance policy, where, for the purpose of recovering an attorney's fee, under Sec. 7068, R. S. 1909, on account of insurer's vexatious refusal to pay, the attorney for plaintiff testified generally as to the reasonable value of his services, without setting out the services in detail, and defendant did not cross-examine him, defendant would not be heard, on appeal, to complain of an allowance for the amount testified to by the attorney.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings, Judge.*

AFFIRMED (*conditionally*).

Nathan Frank and Louis B. Sher for appellant.

(1) The court erred in admitting sec. 58, vol. 3 of the Laws of the State of New York requiring the application to be endorsed upon or attached to the policy when issued. The policy in suit was issued and delivered in Missouri and therefore the laws of this State govern. *Whittaker v. Insurance Co.*, 138 Mo. App. 664; *Haven v. Insurance Co.*, 149 Mo. App. 291. (2) It was error for the court not to allow Dr. Haase, the examining physician, to answer the following questions: "I will ask you to state to the jury whether or not you asked this question and she made this answer: The following is the name of the physician who last attended me, the date of the attendance, and the name of the complaint for which he attended me. Dr. Applewhite, Confinement, 1906;" "I will ask you to state to the jury whether or not Mrs. Schuler mentioned the name of Dr. Blank to you at all?" This was a vital issue in the case and the plaintiff and witness Lula Price were permitted to testify to what was told the

examining physician at the time of his making his examination of the insured. (3) It was error for the court to allow the plaintiff to testify that Pumpelley, the soliciting agent, had told plaintiff that Mrs. Schuler was an unsafe risk and had asked the said plaintiff to have the policy changed from a twenty-year life to a twenty-year endowment, and had written him a letter to that effect, without the witness producing said letter. There was evidence by both parties in the case that the said agent who procured the application for defendant was dead. *Crosno v. Bowser Milling Co.*, 106 Mo. App. 236; *Bank v. Thayer*, 184 Mo. 61; *Williams v. Edwards*, 94 Mo. 447; *McCormick Harvesting Machine Co. v. Heath*, 65 Mo. App. 461; *Nelson v. Railroad*, 66 Mo. App. 647. (4) The insured is bound by her statements in the application in the absence of a showing of fraud or deceit on the part of the agent writing the application. And as there was no allegation in the reply that the said application was procured by fraud, it was error for the court to allow the witnesses to testify to what they had told the examining physician. *Holloway v. Insurance Co.*, 48 Mo. App. 5; *School District v. Insurance Co.*, 61 Mo. App. 600; *Lamar v. Insurance Co.*, 51 Mo. App. 447. (5) The court erred in modifying the instructions requested by the defendant by adding to each of the same "that the verdict should be for plaintiff unless they found under the instructions in the case that the defendant waived the truth of the representations made by the insured." (6) The court erred in refusing to give the following instruction: "The jury are instructed that by the term vexatious as used in these instructions is meant action not taken in good faith and with probable cause, but rather in an effort to embarrass or annoy." It is the duty of the court to explain to the jury the meaning of legal or technical terms occurring in an instruction. *Greene v. Railroad*, 119 Ky. 862, 84 S. W. 1154; *Holmes v.*

Clisby, 121 Ga. 241. Where there is a request to define or explain technical terms in an instruction, it is error to refuse such request. Quirk v. St. Louis U. El. Co., 126 Mo. 279; Johnson v. Railroad, 90 Mo. 340; Rattan v. Central El. Co., 120 Mo. App. 270. (7) The court erred in giving instruction No. — at the request of plaintiff. Knowledge to every agent of a corporation is not legal knowledge to said corporation. There must be an authority shown for the agent to take the application, fill up the same and do all things which may be needful in procuring it, and that the knowledge so acquired by the agent must be during his agency and referring to a transaction within the scope of said agency. Shotliff v. Modern Woodmen of America, 100 Mo. App. 152; Hilburn v. Insurance Co., 140 Mo. App. 368; Thompson v. Traders Ins. Co., 169 Mo. 24. The instruction is further erroneous in that it assumes in the latter part thereof that the company issued the policy with knowledge of the physical condition of the insured with reference to hemorrhages or pulmonary diseases. And the last part thereof which reads that "it thereby waives the defense of said answer being true" is vague and meaningless, and only confused the jury, as nothing was said in that instruction or any previous instruction about any answer having been given. (8) The court erred in giving instruction No. —, at the request of plaintiff. Said instruction is a comment upon the evidence and should not have been given as no witness was impeached by evidence of his bad character for truth or veracity, or by showing that he had made statements out of court inconsistent with his evidence. Bank v. Maxey, 62 Mo. 74; Flynn v. Transit Co., 113 Mo. App. 185, 197; State v. Bischler, 103 Mo. 203, 210-211. (9) The verdict of the jury is not responsive to the instructions of the court and is excessive. The jury were instructed to allow interest on both counts of the petition, commencing with the 10th of September, 1909, but in their ver-

dict allowed the plaintiff interest from the 24th day of July, 1909. (10) The allowance of attorney's fees in this case was excessive. In any event, there should have been no allowance of attorney's fees on the second count of the petition, as there was no evidence whatever of the services performed by the attorney for plaintiff in that behalf, his only statement being that the services rendered under the second count would be reasonably worth \$50.

S. C. Rogers for respondent.

(1) Under the facts and circumstances in this case it cannot be disputed but that the judgment is for the right party. The court should not have permitted appellant to introduce in evidence the application, because it was not attached to the policy as required by the laws of Missouri and the laws of New York. Sec. 6978, R. S. 1909; *Coscarella v. Met. Life Ins. Co.*, 175 Mo. App. 130; *Con. Laws of N. Y.*, vol. 3, p. 1714, sec. 58; *Herb v. Kittaning Ins. Co.*, 138 Pa. 175, 180; *Mutual Life Ins. Co. v. Dingley, etc.*, 49 L. R. A. 132, 138; 100 Fed. 408; *Becker v. Colonial Life Ins. Co.*, 153 A. D. (N. Y.) 382; *Coscarella v. Metropolitan Life Ins. Co.*, 175 Mo. App. 130, 139; *Jones v. Prudential Ins. Co.*, 173 Mo. App. 17; *Buchholz v. Metropolitan Life Ins. Co.*, 177 Mo. App. 692-3; *S. C.* 138, N. Y. Supp. 491; *Murphy v. Col. Life Ins. Co.*, 83 Misc. 475; *Morris v. Life Ass. Co.*, 183 Pa. 563, 573; *Marcus v. Heralds of Liberty*, 241 Pa. 431; *Paulhamus v. Security Life Assn.*, 163 Fed. 554; *Ellis v. Met. Life Ins. Co.*, 228 Pa. 230; *Keller v. Home Life Ins. Co.*, 198 Mo. 460. The court could as a matter of law declare appellant's liability. *Manning v. Ins. Co.*, 176 Mo. App. 678, 689. The court did not err in admitting the New York laws requiring the application to be endorsed upon or attached to the policy when issued. *Connors v. Life Annuity Association*, 171 Mo. App. 364, 369; *Haven*

v. Home Ins. Co., 149 Mo. App. 291, 294; Lange v. New York Life Ins. Co., 254 Mo. 488, 503; Craven v. New York Life Ins. Co., 148 Mo. 583, 607. Amended application not part of contract if issued after the policy of insurance. 19 Cyc. 602; Michigan F. & M. Ins. Co. v. Wich, 8 Colo. App. 409; 46 Pac. 687. (2) The court did not err in refusing to permit Dr. Haase to answer the questions referred to in appellant's brief under Points and Authorities, point 2. Sec. 6354, R. S. 1909; Taylor v. George, 176 Mo. App. 215; Bone v. Friday, 180 Mo. App. 577. The medical examiner is the agent of the company. Coolidge v. Charter Oak Life Ins. Co., 1 Mo. App. 109, 113. (3) It was not error for the court to allow plaintiff to testify that Pumpelley, the soliciting agent who was dead, had told plaintiff that assured was an unsafe risk and he had been instructed to change the policy from a twenty-year life to a twenty-year endowment. Sec. 6354, R. S. 1909. The testimony admitted over objection was with reference to a collateral matter, and was but carrying out the instruction of appellant company. It was cumulative only and harmless. Stahlman v. United Railways Company, 166 S. W. 312; Drew v. Railroad, 129 Mo. App. 459, 466; Sang v. City of St. Louis, 171 S. W. 347, 350; Birdsall v. Coon, 157 Mo. App. 439. (4) The assignment of error in appellant's brief, point 4, is not well taken. Any statement assured may have made in the application was a representation and not a warranty. Sec. 6937, R. S. 1909; Connor v. Life & Annuity Ass'n, 171 Mo. App. 364, 369; Coscarella v. Metropolitan Life Ins. Co., 175 Mo. App. 130. Evidence was admitted and properly so, showing that the examining physician, who was the agent of appellant, was informed as to her exact condition. Schwartz v. Royal Neighbors of America, 108 Pac. 51; 25 Cyc. 933. As to this evidence and this question, it was properly submitted to the jury as has been done in identical cases many times before and

approved. *Roedel v. Jno. Hancock Mutual Life Ins. Co.*, 176 Mo. App. 584; *Keller v. Home Life Ins. Co.*, 198 Mo. 440; *Birdsall v. Coon*, 157 Mo. App. 439; *Wallace v. Prudential Ins. Co.*, 174 Mo. App. 110, 117-8-9; *Tait v. Locke*, 130 Mo. App. 273, 283. (5) Answering appellant's point 5, of its brief, we desire to say the court did not err in modifying the instructions requested by defendant. This was one of the defenses on the part of respondent to appellant's affirmative defense and it would have been error to have omitted it. *Scarritt Estate v. Casualty Company of America*, 166 Mo. App. 570; *Shotliff v. Modern Woodmen of America*, 100 Mo. App. 138, 152; *Nichols v. Insurance Co.*, 170 Mo. App. 437, 449; *Jones v. Prudential Insurance Co.*, 173 Mo. App. 12; *Manning v. Connecticut Mutual Fire Ins. Co.*, 176 Mo. App. 678; *Floyd v. Modern Woodmen of America*, 166 Mo. App. 166; *Burnham v. Insurance Company*, 63 Mo. App. 85. The instructions offered by appellant are very liberal and are the same as were given in the cases of—*Buchholz v. Metropolitan Life Ins. Co.*, 177 Mo. App. 683; *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142—and the addition thereto by the court of the question of waiver was correct. *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355; *Keller v. Home Life Ins. Co.*, 198 Mo. 440. (6) Referring to appellant's point 6 of its brief, it was not error on the part of the court to have refused defendant's instruction. The instruction offered by appellant is not the law. The court correctly declared the law in the instruction given. *Keller v. Home Life Ins. Co.*, 198 Mo. 440. (7) Answering appellant's point 7, the court did not err in giving this instruction on the question of agency. A person who writes the application or solicits the insurance is the agent of the insurance company and not of the assured. Sec. 6938, R. S. 1909. That he is such agent and that his knowledge is the knowledge of the company, has repeatedly been so held in this State and elsewhere. *Mal-*

len v. Life Association, 168 Mo. App. 503; Scarritt Estate v. Casualty Company of America, 166 Mo. App. 567; Hilburn v. Phoenix Insurance Co., 140 Mo. App. 355; Simmons v. Modern Woodmen of America, 172 S. W. 492; Manning v. Connecticut Mutual Fire Ins. Co., 176 Mo. App. 687; Herndon v. Triple Alliance, 45 Mo. App. 426; United Zinc Co. v. General Accident Assurance Corporation Limited, 144 Mo. App. 380; City of DeSoto v. American Guaranty Fire Ins. Co., 102 Mo. App. 1; Ritchey v. Home Insurance Co., 104 Mo. App. 146; 25 Cyc. 803; McGurk v. Metropolitan Life Ins. Co., 1 L. R. A. 563; Lynch v. Prud. Ins. Co., 150 Mo. App. 461, 468-9; Salts v. Prud. Ins. Co., 140 Mo. App. 150. And this instruction correctly declared the law. Wooldridge v. German Ins. Co., 69 Mo. App. 413; Coolidge v. Charter Oak Life Ins. Co., 1 Mo. App. 109; Shotliff v. Modern Woodmen of America, 100 Mo. App. 138. (8) As to appellant's point 8, this was an instruction on the credibility of witnesses, and the principle of law with reference to it is so elementary that it requires no citation of authorities. A cursory examination of the authorities cited by appellant herein will corroborate our statement. (9) Answering appellant's point 9, if this court is of the opinion too much interest was allowed respondent it can easily be computed and remitted. Reading v. Railroad, 173 S. W. 451. (10) Answering appellant's point 10, it seems that if appellant desired to contest the value of attorney's fee, it should have introduced evidence to combat the value placed on the services by the one witness testifying. Dodt v. Prud. Ins. Co., 171 S. W. 655; Coscarella v. Met. L. Ins. Co., 175 Mo. App. 139; Buchholz v. Met. L. Ins. Co., 177 Mo. App. 692. (11) The case should not be reversed unless the errors pointed out by appellant affect the merits of the action and are sufficient to induce a different result upon a re-trial. Sec. 2082, R. S. 1909; Orthwein v. Germania

Life Ins. Co., 170 S. W. 885, 888; Jones v. Prudential Ins. Co., 173 Mo. App. 17.

REYNOLDS, P. J.—Action on two policies of insurance, one a twenty-year endowment policy for \$500, dated July 24, 1908, the other an industrial policy for \$75, the policy dated July 6, 1908. Both policies were in favor of plaintiff, respondent here, and issued on the life of his wife, it being averred that the company issuing the policies was organized and existing under and by virtue of the laws of the State of New York and authorized to transact business in this State as a life insurance company. It is averred that after the issue of the policy on July 24, 1908, by agreement between the parties, on August 5, 1908, the policy was so modified and changed by defendant that the premiums were changed from semiannual payments of \$11.65 to annual payments of \$22.41. Besides the demand for judgment for the amount of these policies, the petition claims damages for vexatious delay and for attorney's fee, interest and costs.

The answer, admitting that defendant is a corporation, organized under and by virtue of the laws of the State of New York but authorized to transact business of life insurance in the State of Missouri, admits the execution and delivery of the policy, admits the death of the insured, and that at the time of her death all the premiums had been paid, but denies all the other allegations in the petition. The answer then sets up that about July 1, 1908, at the city of St. Louis, Missouri, the insured made her certain application in writing, wherein she requested and solicited defendant to issue to her and upon her life, the contract of life insurance evidenced by the \$500 policy, and that in and by this application it was agreed, that inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue upon such appli-

cation and as they act on written statements, answers, and agreements therein made, that no statement, promises or information made or given by or to any person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the company, unless such statements, promises or information be reduced to writing and presented to the officers of the company at the home office; and it is averred that the insured stated and represented to defendant, and for the purpose of inducing defendant to issue the policy, that she had never suffered from hemorrhages or any other pulmonary disease or diseases of the lungs, and thereby expressly agreed that in the event the policy was so issued it should have no force or effect, but should be void, if she had ever had such diseases or any of them, or if at the time of its issuance, she was not in sound health; that in accordance with and in pursuance of said application and in reliance upon these statements, and believing them to be true, the defendant company had executed and delivered this policy. But it is averred that at the time of the execution and delivery of the application and for some time prior thereto, the insured had suffered from hemorrhages of the lungs and pulmonary tuberculosis, and that by reason thereof at the time of the issuance and delivery of the policy, she was not in sound health; that said facts as to the condition of her health were at the time unknown to defendant, and did not become known to defendant until after the death of the insured, but that defendant, relying upon the statements contained in the application and believing them to be true, and being deceived thereby, was led and induced to issue this \$500 policy, which it would not have done had it known the true condition of the health of the insured; that the insured continued to suffer from hemorrhages of the lungs and pulmonary tuberculosis up and until the time of her death, and that these diseases contributed to and ac-

tually caused her death, wherefore it is averred that by reason of the conditions of the application and premises, the contract was from its inception, void and of no effect; and that as soon as the fact of the existence of these diseases became known to defendant, it gave due notice that it repudiated and refused to be bound by the contract and offered to return to the proper representatives of the insured, the premiums paid on the policy, bringing the amount of these premiums into court to be awarded to whoever the court should determine.

The answer to the second count of the petition, which was on the \$75 policy, sets out in substance that it was agreed in said policy that it should be void if the insured, before its date, had suffered from any pulmonary disease, or any disease of the lungs; that its terms could not be changed, or its conditions varied, except by written agreement signed by the president or secretary of the company, and that agents, including superintendents and assistant superintendents, are not authorized and have no power to make, alter or discharge contracts or waive forfeitures. This answer then follows the line of that to the first count as to the insured having had pulmonary consumption, diseases of the lungs, of which she died—the defendant ignorant of her diseased condition until after her death. Tender of the premiums is also averred, it being claimed that by reason of these premises the policy is void.

After a general denial of the new matter, plaintiff, replying to the answer to the first count of the petition, pleads section 58, page 1714, volume 3, Con. Laws of the State of New York, hereafter to be noticed, requiring the application to be indorsed and attached to the policy, averring that this statute was in force at the time of the issuance of this policy, and that when it was issued neither the application nor the substance thereof was indorsed on the policy. In further

reply it is averred that defendant, by its agents, solicited and procured the insured to take out the policy and made its own examination, through its agents, of the physical condition of the insured at the time of the issue of its policy; knew her condition; asked its own questions as to her physical condition; reduced her answers to writing for and on behalf of itself; knew the insured's condition and took and assumed all risks of insured and made its own application to the company and induced and procured the same of its own volition and request, and in all matters acted, in taking the application of the insured and making the examination of her condition and in issuing the policy, as the agent of the insurer, "and not of plaintiff" (sic), and that if, as a matter of fact, "plaintiff" (sic) was not in good health at the time the insurance was effected, or suffered from any disease, as set up in the answer, the defendant, its agents and solicitors knew the facts at the time and knew the full condition of the deceased, and knowing the same, waived all the provisions and requirements as to health and condition of the deceased, and issued the policy, and should be estopped from now setting up the facts pleaded by it.

This was substantially repeated in reply to the second cause of action.

It was in evidence that the amount of the premiums paid by the insured under the policies in suit had been paid into court.

The cause was tried before the court and a jury and resulted in a verdict against defendant in the sum of \$847.75, that verdict made up of \$500 on the one policy, \$107 interest on that from July 24, 1909, \$100 attorney's fee, but nothing for damages for vexatious refusal to pay, making a total of \$707 on the first count; and on the second count, or industrial policy, the verdict was for \$75 for the face of the policy, \$15.75 for interest from July 24, 1909, \$50 attorney's fee, but

nothing for vexatious refusal to pay, a total of \$140.75 on this industrial policy. Judgment followed. Defendant interposing a motion for new trial and excepting to that motion being overruled, has duly perfected its appeal to this court.

The learned counsel for respondent very strenuously argues that under the New York law referred to, as well as under section 6978 of our Revised Statutes 1909, the court should not have permitted appellant to have introduced in evidence the application, and that with this evidence eliminated, and the errors assigned by appellant over this, the judgment should be affirmed. Counsel for appellant, however, contends that there was error in admitting in evidence the New York law and that this being a Missouri contract it is to be interpreted and determined by our laws. We think the contention that these policies are to be treated as Missouri contracts is correct. These policies were negotiated in Missouri, with Missouri citizens and residents, delivered here, and the premiums collected here.

Our Supreme Court held in *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, l. c. 599, 50 S. W. 519, that although the contract provides that it should be construed according to the laws of the State of New York, and that the place of the contract was agreed to be the home office of the company in the city of New York, that nevertheless it was a Missouri contract. This was reiterated in *Horton v. New York Life Ins. Co.*, 151 Mo. 604, l. c. 616, 52 S. W. 356. It was repeated and authorities cited by the Kansas City Court of Appeals in *Whittaker v. Mutual Life Insurance Company of New York*, 133 Mo. App. 664, l. c. 668, 114 S. W. 53, and by the Springfield Court of Appeals in *Haven v. The Home Insurance Co.*, 149 Mo. App. 291, l. c. 294, 130 S. W. 73. To quote Judge JOHNSON in the *Whittaker* case, *supra* (l. c. 668), "That the policy must be regarded as a Missouri contract subject to the

insurance laws of this State, is not a debatable proposition."

The New York law requires that every policy issued and delivered within that State on and after January 1, 1907, "shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any . . . application or other writings unless the same are indorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

We have a very similar provision in section 6978 of our Revised Statutes of 1909, in article IV, chapter 61, as follows:

"Every corporation, company or association transacting business under the provisions of this article shall, upon the issuance of every policy, attach to such policy or indorse thereon the substance of the application upon which such policy was issued, and which is made a part of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy."

This section first appeared as section 7929, Revised Statutes 1899. It applies to this defendant, which is a corporation conducting business in our State, although organized under the laws of the State of New York. Doing business here, making contracts here, our laws enter into its contracts made here. [Cravens v. New York Life Ins. Co., supra.]

While it was error to admit the New York law in evidence, it was immaterial error. We cannot say that its admission was prejudicial. The court admitted it "subject to objection" and did not afterwards pass upon it, and certainly did not instruct on it.

Construing this New York statute, which it will be seen very closely follows our own, it has been held

that a failure to attach that part of the application covering the examination of the physician to the policy, shut out defenses based upon misstatements in connection with the medical examination. [Becker v. Colonial Life Ins. Co., 138 N. Y. Supp. 491.]

In *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, Mr. Justice FIELD, speaking for the Supreme Court of the United States and commenting on the effect of the clause in the application and in the policy, that no statements, representations or information made or given by or to the person soliciting or taking the application, or to any person, shall be binding upon the company or in any manner affect its rights unless such statements, etc., be reduced to writing and presented to the officers of the company at the home office of the company, held (l. c. 534) that having the copy of the application, which was attached to his policy, before him, the insured "would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to have made the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements."

So the reason for this section 6978 of our statute appears; it does afford a material safeguard for the insured in giving him an opportunity, after the policy has been delivered, to examine it and correct any misstatements which may be found in the policy itself or in the application. When the insurance company fails to follow out this statutory provisions, it should not be permitted, on being brought into court, for the first time to confront the plaintiff or claimant with such a very material matter as is here claimed to be a part, of the very essence of the contract, namely the application and its accompanying certificate; should

not be allowed to hold the insured to a knowledge of all that was in the paper which had been kept from him from the time of its execution until brought forward by defendant to defeat the action. We all know, courts as well as people generally, that applicants for insurance sign such papers without careful scrutiny. It was to guard against such traps for the unwary that our statute was enacted. Here the evidence is that neither the insured nor her husband were ever furnished with a copy of the application nor its substance, meaning by the application the personal one and its accompanying physician's certificate. [See *Becker v. Colonial Life Ins. Co.*, supra.] And when the attorney for plaintiff, sometime after the institution of this action, demanded a copy, he was not shown the application until some six or eight months after that demand. Fair treatment demanded more than this, and the absence of a copy of the application or of its substance from the policy itself, and in the light of the requirement of section 6978, that application, and its accompanying certificate, should have been excluded from the jury so far as concerns the first count of the petition.

But it is argued that this section of our statute carries with it no specific penalty. The answer is, that the statute requires the thing to be done. One cannot, failing to obey the law, claim any right founded on that disobedience. By failing to attach the policy or its substance, defendant, under the law, lost whatever benefit it might seek under the application. The converse of the proposition here presented came before us in *Coscarella v. Metropolitan Life Insurance Co.*, 175 Mo. App. 130, 157 S. W. 873. There it was held that the failure of this same defendant, defendant there, to attach the application or its substance to the policy, as required by section 6978, could not deprive the plaintiff of the benefit of the statements of the medical examiner of the defendant, attached to the application, and that those statements could be used against the de-

fendant by the plaintiff in making out his claim. We are not holding that the failure to attach the application or its substance to the policy nullifies the policy. What we do hold is that this absence bars defendant from using it against plaintiff. It follows that when plaintiff introduced the policy, its execution admitted, payment of premiums admitted, the death of the insured admitted, and plaintiff being the beneficiary, that defendant should not have been permitted to introduce the application and its certificates to sustain its defense of misrepresentations. As, notwithstanding this evidence of the defendant, plaintiff recovered, this error does not affect the verdict and judgment on this first count, if there were no other errors.

Turning to the evidence in the case relevant to the second count, as to misrepresentations as to the condition of health of the insured, and it may be said that this also covers the facts involved in the first count and the statements in the application, there was evidence tending to show that the husband of the insured had told the physician who examined her for the company, at the time when he was making the examination, that the insured had been afflicted with pulmonary tuberculosis, of which disease she died, and that this physician had also then been given the name of the physician who attended her for that disease; in brief, that defendant issued both policies with knowledge, on the part of its agents, of her condition. This was in direct contradiction to the answers as taken down by the physician. The weight to be given to this was for the jury. They were properly instructed on the law applicable and their verdict concludes us on both counts.

Without going into the instructions in detail, it is sufficient to say of them that we think they properly presented the issue to the jury in the most favorable light that the defendant was entitled to have. At the close of the case defendant interposed a demurrer and

now contends that there should have been a directed verdict for the defendant. That is untenable. Learned counsel also contends that the verdict is against the weight of the evidence. But the weight of the evidence is for the consideration of the trial court, not of the appellate tribunal.

It is very strongly argued by the learned counsel for appellant that the court refused to allow it to take up that part of the application, the questions in which had been asked by Dr. Haase, the examining physician for the company, and to ask him to state to the jury whether or not he had asked each particular question and the insured had made the answer as written down in the application. The court declined to permit this. Having allowed Dr. Haase to testify in general that the application before him was the one which he had before him when he visited the insured, and that he had asked her the questions and written down the answers as they appeared there, this application was introduced in evidence. All of this contention fails when we hold, as here, that the application, of which this was a part, should not have been admitted in evidence for the defendant, it not having been attached to the policy. It is not out of place, however, to say, that having this general answer, which covers the whole application and all the questions and answers in it in evidence, it was within the sound discretion of the court to say whether it would permit counsel to take up each question and answer in detail and put them to the witnesses. We see no error in refusing to allow this.

Error is assigned to the allowance of testimony as to conversation between a soliciting agent of the defendant, now dead, and the husband of the insured, plaintiff here, that agent, it was claimed, having said that he considered the insured an unsafe risk and had asked plaintiff to have the policy changed from a twenty-year endowment, which was the form of policy

ultimately written. As we have held in *Carroll v. United Rys. Co.*, 157 Mo. App. 247, 137 S. W. 303, conversation with the agent and a party to the transaction and another party to that transaction or contract and cause of action, that agent being dead, is not admissible. But this evidence was merely cumulative. There was other evidence that established this fact, testified to beyond question, and we do not think that the admission of it in the very casual way in which it came in, is reversible error. [*Floyd v. Prudential Ins. Co.*, 72 Mo. App. 455, 1, c. 460.]

It is claimed that the insured is bound by her statements in the application, in the absence of showing fraud or deceit on the part of the agent writing the application, and there being no allegation in the reply that the application was procured by fraud, that it was error for the court to allow witnesses to testify to what they had told the examining physician. This assignment falls under our ruling that the application should not have been admitted in evidence.

The action of the court in modifying the instructions asked by defendant and which were then given with the modification, is also assigned for error. We are not advised by the bill of exceptions what the modification was. Gathering this, however, from the briefs of counsel, we are to presume that it was adding to the requested instructions asked by defendant the words "that the verdict should be for plaintiff unless they [the jury] found under the instructions in the case that the defendant waived the truth of the representations made by the insured." We find no exception to the alteration of any instructions but there is exception to the instructions as given by the court, and in the instructions as given by the court this clause appears, after saying that under all the circumstances the jury should find for defendant, "unless you find under the instructions in this case that the defendant waived the defense of

the truth of said representations." With this addition there was no error in these instructions, if this was an addition. There was no error in the instructions which the court gave of its own motion, in fact they were very favorable to defendant and would have been erroneous if, as they purported to cover the whole case, they had not been followed by this cautionary proviso.

Exception is also taken to the action of the court in refusing an instruction defining "vexatious delay," that instruction as asked being "that by the term 'vexatious delay,' as used in these instructions is meant action not taken in good faith and with probable cause but rather in an effort to embarrass or annoy." We do not say that this instruction would have been error if given. It is true that the term "vexatious" is, in a way, a technical term, but it is also a term of very common use. We think it was sufficiently defined to the jury here by the court when it told the jury, in instructing as to the amount of the verdict, that if the jury should find "from all the facts and circumstances shown by the evidence that this refusal to pay was vexatious, that is, without reasonable cause, then you may allow" plaintiff, in addition to the amount of the policy referred to, interest and a reasonable attorney's fee. We think this sufficiently defined and intelligently put to the jury the meaning of the word "vexatious." With that in the instructions on both the first and second counts, we see no error in the refusal of the instruction as asked by defendant on that point.

Error is assigned to an instruction given at the instance of plaintiff, to the effect that if they found from the evidence that the insured or any one for her "made known to an agent or superintendent or examining physician of defendant company the facts relative to her physical condition with reference to hemorrhages or pulmonary disease and of her confinement and treatment therefor, or if such agent, superintendent or examining physician knew such facts, then

his knowledge is the knowledge of the defendant company *and if said company with said knowledge* issued and delivered the policy sued on in the first count of plaintiff's petition, it thereby waived the defense of said answer being true and your verdict should be for plaintiff on the first count of his petition." The words underscored are the ones particularly objected to, it being claimed that knowledge to every agent of the corporation is not legal knowledge to the corporation. With the application in evidence and against the conclusiveness of which as against plaintiff, this instruction was levelled, we do not think that it is subject to this interpretation. The agents to whom the facts concerning the physical condition of the insured are shown by the evidence to have been known, were the examining physician, who here was the agent of the insurer (*Floyd v. Modern Woodmen of America*, 166 Mo. App. 166, 148 S. W. 178), and sent by defendant, and the assistant manager or superintendent at St. Louis. So that the jury, in applying this instruction to the evidence in the case, must have fully understood that it referred to the knowledge of these particular officers and that it did not give them a roving commission to inquire into the possibility of some other agent knowing it. That is not the sense nor the fair meaning of this instruction and we see no error in it.

The knowledge of the local agents who negotiated the contract is the knowledge of the company. [*Manning v. Connecticut Fire Ins. Co.*, 176 Mo. App. 678, 1. c. 689 and cases there cited, 159 S. W. 750.] And this is so even in the face of a contrary provision in the application or policy. [*James v. Mutual Reserve Fund Life Assn.*, 148 Mo. 1, 1. c. 10, 49 S. W. 978.]

The court gave the instruction usual in so many cases as to the credibility of witnesses. The form of that instruction is not objected to, but it is urged that it is a comment upon the evidence and should not have been given as no witness was impeached by evidence

of his bad character for truth or veracity, or by showing that he had made statements out of court inconsistent with his evidence. We do not understand that instructions of this kind are limited to cases of impeachment or where impeachment occurs. There was a very sharp conflict in the evidence here on very material matters connected with it. As for instance, the examining physician testified most positively to a certain fact and witnesses for plaintiff directly contradicted him. This, too, on a very material fact, and under the evidence in the case we cannot see that this instruction was improper.

Finally, it is urged that the verdict is not responsive to the issues and is excessive and that the allowance of attorney's fee was excessive.

Taking up the latter proposition, the attorney testified to the value of his services. It is true he did not set those services out in detail, but he did testify that in his opinion they were worth from \$100 to \$200 in one case and \$50 in the other. It was open to defendant to develop by cross-examination the nature and extent of those services. Having an opportunity to do so and not availing itself of it, it cannot now complain.

It does appear that in casting up the interest in this case on the sums represented in the two policies, the jury fell into an error, calculating interest from July 24, 1909. This is error. The court instructed the jury that if plaintiff recovered he was entitled to the amounts of the policies with interest on those amounts at six per cent per annum from the 10th of September, 1909. So there is an excess of interest of \$4.39. Other than this, we find no reversible error. If, therefore, plaintiff will remit this sum of \$4.39 within thirty days, the judgment of the circuit court will be affirmed. Otherwise the judgment will be reversed and the cause remanded. *Nortoni and Allen, JJ., concur.*

HANNAH DESSAUER, Respondent, v. SUPREME
TENT OF THE KNIGHTS OF MACCABEES
OF THE WORLD, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 9, 1915.
Opinion Filed May 4, 1915.

1. **PLEADING: Motion for Judgment: Scope.** A motion for judgment on the pleadings and a stipulation admits all facts well pleaded, as well as those covered by the stipulation.
2. **FRATERNAL BENEFICIARY ASSOCIATIONS: Change of By-Laws: Effect on Prior Certificates.** Where a death benefit certificate issued by a fraternal beneficiary association provided for payment of the benefit if the member had complied with, and that the rights of the beneficiary should be governed by, the laws of the order then in force *or thereafter adopted*, a by-law subsequently adopted, which declared that no benefit should be paid on the death of a member committing suicide, but that the beneficiary should receive twice the amount contributed to the life benefit fund by the member, precluded a recovery for the death of a member who committed suicide, although he had been a member for more than five years and the by-laws in force when the certificate was issued provided for payment of the benefit in case a member committed suicide five years or more after the date of the certificate. [NORTON, J., dissents.]

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

REVERSED AND REMANDED (*with directions*). CERTIFIED TO SUPREME COURT.

D. D. Aitken and *R. P. & C. B. Williams* for appellant.

(1) The defendant is a co-operative society founded upon the mutual relations of its members, one to the other. The relationship of the members is two-fold—that is, as individuals they are the insured, and collectively they are the insurers. *Korn v. Mutual Assurance Society*, 3 L. Ed. 6 Cranch, 195; *Haydell v.*

Mutual Reserve Fund Life Association, 98 Fed. 204; Supreme Commandery v. Ainsworth, 71 Ala. 451; Fullenweider v. Royal League, 73 Ill. App. 335; Miller v. National Council, 69 Kan. 240; Mutual Reserve Fund Life Association v. Taylor, 99 Va. 219; Reynolds v. Royal Arcanum, 192 Mass. 155; Hall v. Western Travelers' Accident Association, 69 Neb. 601; Wright v. Minnesota Mutual Life Insurance Company, 48 L. Ed. 193 U. S. 832; Barrows v. Mutual Fund Life Association, 151 Fed. 461; Westerman v. Supreme Lodge, 196 Mo. 670. (2) The defendant is not an insurance company, but is a fraternal beneficiary association, organized under the laws of the State of Michigan, authorized to do business in this State, and is by statute exempt from the operation of the insurance laws of this State and is exempt from the suicide statute applying to insurance companies. Westerman v. Supreme Lodge, 196 Mo. 738; Tice v. Supreme Lodge, 204 Mo. 349; Scorr v. Royal League, 223 Ill. 32; Cavanaugh v. Royal League, 158 Mo. App. 234. (3) There is no law or public policy prohibiting a member of a benefit society from contracting in advance that future laws may be passed by societies changing and modifying the indemnity in the original certificate, and if such stipulation is made, the by-law will be enforced. Shipman v. Protected Home Circle, 174 N. Y. 398; Richmond v. Supreme Lodge, 100 Mo. App. 8; Morton v. Royal Tribe, 93 Mo. App. 78; Lewine v. Supreme Lodge, 122 Mo. App. 547; Westerman v. Supreme Lodge, 196 Mo. 738; Ellerbe v. Faust, 119 Mo. 653. (4) The certificate, application, and by-laws of a mutual benefit society constitute the contract with the member, and all must be read together in order to see all the terms and conditions of the contract. Westerman v. Supreme Lodge, 196 Mo. 738; Richmond v. Supreme Lodge, 100 Mo. App. 8; Slater v. Supreme Lodge, 76 Mo. App. 387; Laker v. Royal Union, 95 Mo. App. 353; Shipman v. Protected Home Circle, 174 N. Y. 398. (5) A by-law

restricting and entirely excluding liability for death by suicide is reasonable. The following are suicide cases and sustain this doctrine: *Tice v. Supreme Lodge*, 204 Mo. 349; *Morton v. Royal Tribe*, 93 Mo. App. 78; *Supreme Commandery v. Ainsworth*, 71 Ala. 436; *Fraternal Union v. Ziegler*, 145 Ala. 286; *Knights of Pythias v. Kirtchmar*, 179 Ill. 341; *Knights of Pythias v. Trebbe*, 179 Ill. 348; *Scow v. Royal League*, 223 Ill. 342; *Knights of Maccabees v. Hammers*, 81 Ill. App. 560; *Knights of Maccabees v. Steinland*, 206 Ill. 124; *Knights of Maccabees v. Nelson*, 77 Kan. 629; *Daugherty v. Knights of Pythias*, 48 La. Ann. 1203; *Dorns v. Knights of Pythias*, 75 Miss. 466; *Lang v. Royal Highlanders*, 75 Neb. 188; *Shipman v. Protected Home Circle*, 174 N. Y. 398; *Tiesch v. Protected Home Circle*, 72 O. St. 233; *Chambers v. Knights of Maccabees*, 200 Pa. 244; *Knights of Pythias v. Lamalta*, 95 Tenn. 157; *Eversburg v. Knights of Maccabees*, 33 Tex. Civ. App. 549; *Hughes v. Wisconsin Odd Fellows*, 98 Wis. 292; *Tice v. Supreme Lodge*, 123 Mo. App. 85. (6) There is no vested interest in a benefit certificate issued by a fraternal beneficiary association, and therefore its subsequent by-laws changing the contract or reducing its obligations does not disturb any vested rights. *Westerman v. Supreme Lodge*, 196 Mo. 737; *Masonic Benefit Association v. Bunch*, 109 Mo. 560; *Wells v. Mutual Benefit Association*, 126 Mo. 630; *Richmond v. Supreme Lodge*, 100 Mo. App. 8; *Morton v. Royal Tribe*, 93 Mo. App. 78; *Shipman v. Protected Home Circle*, 174 N. Y. 368; *Casualty Co. v. Kucer*, 169 Mo. 314; *Grand Lodge v. McFadden*, 213 Mo. 284; *Hofman v. Grand Lodge*, 73 Mo. App. 47; *Grand Lodge v. Reman*, 75 Mo. App. 402; 1 *Bacon Benefit Societies*, sec. 291a; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207; *Ables v. Ackley*, 133 Mo. App. 603. (7) The defendant has the inherent power to adopt, modify, add to and amend by-laws. This is a power possessed by all corporations. 1 *Thompson*

on Corporations (1 Ed.), sec. 955; 1 Bacon on Benefit Societies (3 Ed.), sec. 79; Niblack on Benefit Societies, sec. 16, p. 30; Schrick v. St. Louis Mut. Co., 34 Mo. 423; Allen v. Life Assn., 8 Mo. App. 52; State ex rel. v. Grand Lodge, 70 Mo. App. 456; Supreme Com. v. Ainsworth, 71 Ala. 445; Supreme Lodge v. Knight, 117 Ind. 489; Angel & Ames on Corporations, sec. 325; Boisot on By-Laws, sec. 6. (8) Where the member either in the application or certificate, agrees to be bound by after-enacted by-laws or the obligation of the society to pay is made subject to or liable to forfeiture, if the member shall not comply with laws, rules and regulations that may be subsequently adopted, as well as those in force at the time he joined, such after-enacted by-laws are valid and binding. Westerman v. Supreme Lodge, 196 Mo. 738; Ellerbe v. Faust, 119 Mo. 653; Schrick v. St. Louis Mut. Co., 34 Mo. 423; Allen v. Life Ins. Co., 8 Mo. App. 52; State ex rel. v. Grand Lodge, 70 Mo. App. 456; Richmond v. Supreme Lodge, 100 Mo. App. 8; Morton v. Royal Tribe, 93 Mo. App. 78; Supreme Com. v. Ainsworth, 71 Ala. 436, 46 A. R. 532; Fraternal Union v. Zeigler, 145 Ala. 287; Grand Lodge v. Burns, 84 Conn. 356; Masonic Benefit Assn. v. Severson, 71 Conn. 719; Gilmore v. Knights of Columbus, 77 Conn. 58; Bowie v. Grand Lodge, 99 Cal. 392; Stohr v. Musical Society, 82 Cal. 557; Brown v. Knights, 43 Colo. 286; Union Frat. League v. Johnson, 124 Ga. 902; Supreme Tent v. Hammers, 81 Ill. App. 560; Supreme Lodge v. Krutscher, 179 Ill. 340, 70 A. S. R. 120; Supreme Lodge v. Trebbe, 179 Ill. 348, 70 A. S. R. 120; Scow v. Royal League, 223 Ill. 32, 79 N. E. 42; Supreme Tent v. Steinhous, 206 Ill. 124, 68 N. E. 1090; Royal Arcanum v. McKnight, 238 Ill. 349, 87 N. E. 299; Baldwin v. Bigley, 185 Ill. 180; Thorell v. Supreme Ct. Honor, 115 Ill. App. 313; Murphy v. Norwolk, 223 Ill. 301; Garrity v. Order of Foresters, 148 Ill. App. 189; Ross v. Brotherhood, 120 Iowa, 696; Norton v. Order of Foresters, 138 Iowa,

464, 24 L. R. A. (U. S.) 1030; Ury v. Modern Brotherhood, 149 Iowa, 709; Supreme Lodge v. Knight, 77 Kan. 629; Supreme Tent v. Nelson, 77 Kan. 629; Daugherty v. K. of P., 48 La. Ann. (part 11) 1203; Reynolds v. Royal Arcanum, 192 Mass. 150, 7 L. R. A. (U. S.) 1154; Paine v. Society, 172 Mass. 321, 52 N. E. 502; Mathieu v. Mathieu, 112 Md. 625; Borgards v. Ins. Co., 79 Mich. 440; Brinnell v. Supreme Council, 140 Mich. 220; Monger v. New Era Ass'n, 156 Mich. 645; Brown v. Great Camp, 167 Mich. 123; Supreme Lodge v. Stein, 75 Miss. 106; Dornes v. Supreme Lodge, 75 Miss. 466; Farmers' Ins. Co. v. Kinney, 64 Neb. 808; Lang v. Royal Highlanders, 75 Neb. 188, 10 L. R. A. (U. S.) 666; Briggs v. Royal Highlanders, 84 Neb. 834; Supreme Council v. Adams, 68 N. H. 236; State ex rel. v. Camden Lodge, 73 N. J. L. 500; Shipman v. Home Circle, 174 N. Y. 398; Hutchinson v. Supreme Tent, 68 Hun, 355; Green v. Insurance Co., 139 N. C. 309; Tisch v. Protected Home Circle, 72 Ohio St. 233; Chambers v. Supreme Tent, 200 Pa. St. 244; Supreme Lodge v. La Malta, 95 Tenn. 157; West v. Grand Lodge, 14 Tex. Civ. App. 471; Eversberg v. Supreme Tent, 3 Tex. Civ. App. 549; Fugure v. Mutual Society, 46 Vt. 362; Plunkett v. Supreme Conclave, 107 Va. 643; Schmidt v. Supreme Tent, 97 Wis. 528; Hughes v. Wisconsin Odd Fellows, 98 Wis. 292; Laeffler v. Modern Woodmen, 100 Wis. 79; Langnicker v. A. O. U. W., 111 Wis. 279; Wright v. Mut. Life Ass'n, 193 U. S. 657; Korn v. Mutual Society, 3 L. Ed. (6 Cranch.) 195; Barrows v. Mut. Reserve, 151 Fed. 461; Order of Commercial Travelers v. Smith, 192 Fed. 102; Supreme Lodge v. Light, 195 Fed. 903; Lloyd v. Knights of Pythias, 98 Fed. 66. The following is a list of authorities by States passing on after-enacted suicide by-laws, as well as by-laws on kindred subjects, wherein the same principle is involved: Alabama—Supreme Commandery v. Ainsworth, 71 Ala. 436; suicide by-law; sustained; Fraternal Union of America v. Zeigler, 145

Ala. 287, 39 So. 751; suicide by-law; sustained. California—Stohr v. Musical Fund Society, 82 Cal. 557; sick and disability benefits by-law; sustained; Bowie v. Grand Lodge, 99 Cal. 392; endowment installments modified; sustained; Schmierer v. Mut. Reserve Fund Life Assn., 153 Cal. 208; rates increase; sustained; Caldwell v. Grand Lodge, 148 Cal. 195; classification of beneficiaries; sustained. Colorado—Brown v. Knights of Protected Ark, 43 Colo. 289, 96 Pac. 450; forfeiture provision; nonpayment of assessments; sustained. Connecticut—Masonic Mut. Benefit Ass'n v. Severson, 71 Conn. 719; eligibility of beneficiaries; sustained; Gilmore v. Knights of Columbus, 77 Conn. 58; prohibited occupation sustained; Grand Lodge, Etc., v. Burns, 80 Atl. 157; prohibited occupation; liquor business; sustained. Georgia—Union Fraternal League of Boston v. Johnston, 124 Ga. 902; creating remedies and tribunals within the order sustained. Illinois—Supreme Tent K. O. T. M. v. Hammers, 81 Ill. App. 560; suicide by-law; sustained; Supreme Lodge K. of P. v. Kutscher, 179 Ill. 340; suicide by-law; sustained; Supreme Lodge K. of P. v. Trebbe, 179 Ill. 348; suicide by-law; sustained; Baldwin v. Begley, 185 Ill. 180; eligibility of beneficiaries; sustained; Theorell v. Supreme Court of Honor, 115 Ill. App. 313; disability by-law; sustained; Murphy v. Mowak, 223 Ill. 301; eligibility of beneficiaries; sustained; Scow v. Royal League, 223 Ill. 32; suicide by-law; sustained; Royal Arcanum v. McKnight, 238 Ill. 349; eligibility of beneficiaries; sustained; Garrity v. Catholic Order of Foresters, 148 Ill. App. 189; reclassification of prohibited occupations; sustained. Iowa—Ross v. Brotherhood of America, 120 Ia. 692; disability by-law; sustained; Norton v. Order of Foresters, 138 Ia. 464; reclassification of prohibited occupations; sustained; Ury v. W. W. A., 127 N. W. 665; forfeiture; death due to intoxication; sustained. Kansas—K. O. T. M. v. Nelson,

77 Kan. 629, 95 Pac. 1052; suicide by-law; sustained. Louisiana—Daughtry v. K. of P., 48 La. Ann. (part II) 1203; suicide by-law; sustained. Maryland—Mathieu v. Mathieu, 112 Md. 625; by-law for change of beneficiary; sustained. Massachusetts—Paine v. Society, Etc., 172 Mass. 321; disability benefits; sustained. Michigan—Borgards v. Insurance Co., 79 Mich. 440; additional forfeiture provision; sustained; Brinnen v. Supreme Council C. M. B. A., 140 Mich. 220; eligibility of beneficiaries; sustained; Monger v. New Era Ass'n, 156 Mich. 645; requiring submission of claims to tribunals of the order, etc.; sustained; Brown v. Great Camp, K. O. T. M., 167 Mich. 123, 132 N. W. 562; prohibited occupation by-law; sustained. Mississippi—Supreme Lodge v. Stein, 75 Miss. 106; suicide by-law; sustained; Dornes v. Supreme Lodge K. of P., 75 Miss. 466; suicide by-law; sustained. Missouri—Schrick v. Mutual Co., 34 Mo. 423; deprived member of right to receive money promised; sustained; Richmond v. Supreme Lodge, 100 Mo. App. 8; suicide by-law; sustained; Morton v. Royal Tribe, 100 Mo. App. 78; suicide by-law; sustained; Westerman v. Supreme Lodge, 196 Mo. 739; after-enacted law of State applies to certificate issued prior thereto; Ellerbe v. Faust, 119 Mo. 653; occupation; sustained; Allen v. Life Association, 8 Mo. App. 52; change of charter; sustained; State ex rel. v. Grand Lodge, 70 Mo. App. 466; occupation saloonkeeper; sustained. Nebraska—Farmers' Mut. Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926; additional forfeiture provision; sustained; Briggs v. Royal Highlanders, 84 Neb. 834, 122 N. W. 69; suicide by-law; sustained. New Hampshire—Supreme Council v. Adams, 68 N. H. 236; by-law governing disposition of funds; sustained. New Jersey—State ex rel. v. Camden Lodge, 73 N. J. L. 500; against entering saloon business; sustained. New York—Poultney v. Bachman, 31 Hun, 49; sick benefits; sustained; Hutchinson v. Supreme Tent K. O. T.

M., 68 Hun, 355; disability benefits; sustained; Shipman v. Proc. Home Circle, 174 N. Y. 398, 63 L. R. A. 347; suicide, insured being sane; sustained. North Carolina—Green v. Insurance Co., 139 N. C., 309; changing class of business; sustained. Ohio—Tisch v. Protected Home Circle, 72 Ohio St. 233; suicide by-law; sustained. Pennsylvania—Chambers v. Supreme Tent, 200 Pa. 244; suicide by-law; sustained. Tennessee—Supreme Lodge K. of P. v. La Malta, 95 Tenn. 157, 30 L. R. A. 838; suicide by-law; sustained. Texas—West v. Grand Lodge, 14 Texas Civil Appeals 471; eligibility of beneficiaries; sustained; Eversberg v. K. O. T. M., 33 Texas Civil Appeals 549, 77 S. W. 246; suicide by-law; sustained. Vermont—Fugure v. Mutual Society, Etc., 46 Vt. 362; reduction of benefits; sustained. Virginia—Plunkett v. Supreme Conclave, 105 Va. 643, 55 S. E. 9; suicide by-law; sustained. Wisconsin—Schmidt v. Supreme Tent, 97 Wis. 528; reclassification of prohibited occupations; sustained; Hughes v. Wisconsin Odd Fellows, 98 Wis. 292; suicide by-law; sustained; Loeffler v. Modern Woodmen, 100 Wis. 79; reclassification of prohibited occupations; sustained. Federal Courts—Barrows v. Mut. Reserve Life Ins. Co., 151 Fed. 461; rates increase; sustained; Order of United Commercial Travelers of America v. Smith, 192 Fed. 102; definition of “external, violent and accidental means”; sustained; Supreme Lodge, Etc., v. Light, 195 Fed. 903; reclassification of prohibited occupations; sustained; Korn v. Mutual Assurance Society, 3 L. Ed. (6 Cranch.) 195; modification of plan of business; sustained; Wright v. Minn. Mut. Life Ins. Co., 193 U. S. 657; reorganization and change of character of association; sustained.

William S. Campbell for respondent.

(1) Subsequent by-laws undertaking to reduce the amount to be paid under certain contingencies,

such as death by suicide, do not take effect on previous contracts, and stipulations in the application and certificate of insurance that the member will comply with future regulations, mean the members will comply with such as relate to his duty as a member, but does not mean that the association may interfere with the essential purpose of the contract, namely, the indemnity covenanted to be paid. *Zimmerman v. Supreme Tent, K. O. T. M.*, 122 Mo. App. 591; *Mathews v. Modern Woodmen*, 236 Mo. 326, 349; *Dieterich v. Modern Woodmen*, 161 Mo. App. 97, 101; *Morton v. Supreme Council*, 100 Mo. App. 76, 92; *Smail v. Court of Honor*, 136 Mo. App. 434; *Kavanaugh v. Royal League*, 158 Mo. App. 234, 243; *Lewine v. Supreme Lodge K. of P.*, 122 Mo. App. 547; *Pearson v. Knights Templar, Etc.*, 114 Mo. App. 283, 288; *Wilcox v. Court of Honor*, 134 Mo. App. 547; *Sisson v. Supreme Court of Honor*, 104 Mo. App. 54, 61; *Young v. Railway Mail Assn.*, 126 Mo. App. 325; *Campbell v. American Benefit Club*, 100 Mo. App. 249; *Smith v. Supreme Lodge K. of P.*, 83 Mo. App. 512, 526; *Grand Lodge v. Sater*, 44 Mo. App. 445, 452, 453; *Hysinger v. Supreme Lodge K. of P.*, 42 Mo. App. 627, 635; *Dowdall v. Catholic Mutual Benefit Assn.*, 196 New York, 405, 408; *Weber v. Maccabees*, 172 N. Y. 490, 493; *Beach v. Supreme Tent of Maccabees*, 177 N. Y. 100; *Evans v. Southern Tier Masonic Relief Assn.*, 182 N. Y. 453; *Ayers v. Order of United Workmen*, 188 N. Y. 280; *Olson v. Court of Honor*, 100 Minn. 117, 119, 121; *Ruder v. National Council, Etc.*, 124 Minn. 431; *Smythe v. Supreme Lodge K. of P.*, 198 Fed. 967, 989; *Knights Templar & Masons Indemnity Co. v. Jarman*, 44 C. C. A. 93, 104 Fed. 638; *Parks v. Supreme Circle Brotherhood of America*, 89 Atl. (N. J. Ch.) 1042; *Newhall v. American Legion of Honor*, 181 Mass. 111, 117; *Pokrefky v. Fireman's Fund Assn.*, 121 Mich. 456; *Heptasophs v. Rehan*, 119 Md. 92. (2) It has been repeatedly held that the provision in the application of the member to

comply with future by-laws and regulations mean the member will comply with such by-laws, rules and regulations as relate to his duties as a member of the association, and that the order is powerless, by by-laws or otherwise, to change or modify the essentials of the contract of insurance without the express consent of the member. *Zimmerman v. Supreme Tent, K. O. T. M.*, 122 Mo. App. 591; *Kavanaugh v. Royal League*, 158 Mo. App. 234, 243; *Morton v. Supreme Council*, 100 Mo. App. 76, 92; *Campbell v. American Benefit Club*, 100 Mo. App. 249; *Sisson v. Supreme Court of Honor*, 104 Mo. App. 54, 61. (3) An after enacted by-law which has the effect of materially changing the contract between the insured and the society, by greatly reducing the amount which his beneficiary would receive at his death, is an unreasonable change, and not binding upon the insured or his beneficiary. *Kavanaugh v. Royal League*, 158 Mo. App. 234; *Lewine v. Supreme Lodge, K. of P.*, 122 Mo. App. 547.

REYNOLDS, P. J.—The petition in this case avers that on August 14, 1900, the defendant organization issued to one Emanuel Dessauer its certificate of membership whereby it was agreed, among other things, that upon satisfactory proof of the death of the member, together with the surrender of the certificate, that defendant would pay to plaintiff, the beneficiary named, who was the wife of the member, the sum of \$3000. Averring that the member had observed and performed all the conditions and stipulations in the certificate and had made all payments required to be made under its terms, and that he died on January 19, 1911; that plaintiff furnished all proofs of death required by defendant and surrendered to it therewith the policy or certificate, and that she has demanded payment of the \$3000, which has been refused, and averring that that refusal was vexatious, judgment is demanded for \$3000, the amount of the

policy and interest, for ten per cent of that amount by way of damages, and \$300 for attorney's fee, a total of \$3600, interest and costs. Attached to this petition as an exhibit and taken as part thereof in the motion for judgment hereafter referred to, is the certificate of membership. This recites that Emanuel Dessauer has been regularly admitted as a member of the order, and that in accordance with, and under the provisions of the laws of the order, he is entitled to all the rights, benefits and privileges of membership therein, and that at his death one assessment on the membership, not exceeding in amount the sum of \$3000 will be paid to plaintiff, his wife, upon satisfactory proof of his death, together with the surrender of the certificate, "*provided he shall have in every particular complied with the laws of the order now in force, or that may hereafter be adopted*", and has not obtained his membership by fraud . . . as shown by his application, which is hereby made a part of this certificate." (Italics ours.) This is dated August 14, 1900, the policy being delivered to the member on August 28, 1900.

The answer avers that defendant is a fraternal beneficial association, created and organized under the laws of the State of Michigan; that it has complied with the laws of the State of Missouri and is authorized to do business in this State as a fraternal beneficiary association and was so authorized at the time of the issuance of the certificate involved, defendant being successively authorized to do business in this State under the laws thereof after the issuance of the benefit certificate down to the present time. Averring that it has the qualifications required under our law to constitute it a fraternal beneficiary association, and is carried on exclusively as such, it is further averred that on July 13, 1900, Dessauer made application to one of the subordinate lodges of the defendant organization for a certificate in the sum of \$3000, payable in case of his death to his wife; that in the application for the

membership Dessauer "agreed that the laws of the Supreme Tent of the Knights of the Maccabees *at that time in force, or that might thereafter be adopted*, should form the basis of this contract for beneficial membership, and that all the rights of the beneficiary should be governed, measured and controlled *by the laws then in force, and by the laws that might thereafter be adopted*." (Italics ours.) Admitting that the certificate was issued upon an application bearing date July 13, 1900, it is averred that the certificate, among other things, provides that the sum of \$3000 was to be paid the beneficiary, provided the member shall have, in every particular, complied with the laws of the order at that time in force *or that might after that time be adopted*" (Italics ours.) It is further averred that after this certificate had been applied for by and issued to Dessauer, namely, on July 26, 1904, the following by-law was duly adopted by the order at its annual meeting duly called and held at that time, the amendment designated as section 396, namely:

"No benefits shall be paid on account of the death of a member who shall die by his own hand, whether sane or insane, provided, however, that the beneficiary named in life benefit certificate, or the person legally entitled to the benefit, shall receive an amount equal to twice the amount contributed to the life benefit fund by the member during his lifetime."

It is averred that this by-law, after its adoption, was printed, published and distributed by defendant, *and that the member Dessauer had knowledge and notice of the adoption and promulgation of it, acquiesced in the same and continued to pay his assessments and dues thereafter up to the time of his death*. Averring that the member Dessauer, on January 19, 1911, took his own life by shooting himself in the head with a pistol and thereby, under the meaning of the law, had committed suicide, and averring that during his life the member had paid into the life benefit fund the

sum of \$372, it is averred that defendant is indebted to plaintiff in double that sum, namely, \$744, and no more, which sum it is averred it has tendered to plaintiff and now asks to be allowed to pay into court as the full amount due plaintiff under the certificate.

The stipulation of facts sets out that for the purposes of the motion of plaintiff for judgment on the petition, answer, and on this stipulation, that on August 14, 1900, the date upon which the benefit certificate sued on in the case was issued to Dessauer, the laws of the Supreme Tent relating to suicide were as follows:

“No benefit shall be paid . . . when death was the result of suicide within five years after admission, whether the member taking his own life was sane or insane at the time, or when the death of the member was intentionally caused by the beneficiary or beneficiaries of such member; provided, that in case of suicide within five years after admission, all assessments paid to the Supreme Tent by such member shall be paid back to the beneficiary named in the certificate and such amount shall be the full amount that can be claimed in any such case.”

It was further agreed in this stipulation that the date of the filing of the petition in the case should be taken as May 18, 1911, upon which date defendant entered its appearance in the case.

This stipulation filed, plaintiff filed a motion for judgment on the petition, answer, and stipulation.

This motion proceeds on the theory that the defense of suicide set up by defendant, even if proven, would not constitute any defense to the action for the reason that the amended by-law pleaded, and as it is alleged in defendant's answer, was passed after the issuance of the benefit certificate involved and is therefore not binding upon plaintiff; that it appears by the stipulation filed that at the time that benefit or membership certificate was issued, the by-law set out and

embodied in the stipulation was in force, and that it appeared by the pleadings that Dessauer had been a member of defendant organization for more than five years at the time of his death.

It is further set out in this motion that defendant had no power, after the issuance of the certificate to the insured, to enact this by-law No. 396, which has the effect to destroy the contract entered into with the insured, and thereby decreasing the amount the beneficiary shall receive.

The first judgment of the court in the case awarded plaintiff \$3427.50. On motion this was set aside and a new judgment entered in favor of plaintiff for \$3135, that being the full amount called for on the face of the certificate, and interest.

When this case was first docketed for hearing we passed it, on the statement of counsel that there was a case then pending in the Supreme Court of our State, the determination of which would have an important bearing on this case. Later that case was decided by the Supreme Court and this cause was redocketed for hearing, argued and submitted. We have the case referred to now before us, it being that of Claudy v. The Royal League, 259 Mo. 92, 168 S. W. 593.

The motion for judgment admits all the facts well pleaded in the petition and answer as also those covered by the stipulation.

The learned counsel for respondent challenges the binding effect of the Claudy decision as not covering the facts or point here involved and claims that inasmuch as many of the cases relied upon by him hold a like change of law is not binding on one who had acquired rights prior to the change, that it was not intended to override those decisions.

Our consideration of that decision and the opinion of our Supreme Court in that case satisfies us that we are concluded by it in this case. It is true that the opinion does not, by name, overrule all the cases

relied on by counsel for respondent. But when we consider what it does hold and the cases to which it does refer, we think that the point here involved is covered and fully met.

Examination of the line of decision and of the cases which are referred to demonstrates this. Thus our own court, in *Richmond v. Supreme Lodge, Order of Mutual Protection*, 100 Mo. App. 8, 71 S. W. 736, the decision rendered January 20, 1903, held, discussing the amount to be paid under a certificate, the amended by-law making it lower in amount than the amount payable at the time the certificate was issued, that such amended by-laws were valid, the certificate, by-laws and constitution of the order in force at the time the member joined contemplating and providing for the modification of the member's right by subsequent by-laws; that under such provision of the organic rules of the order which entered into the contract, such a change was within the power of the association although the member's consent had not been specifically obtained. A few months later our court, in *Morton v. Supreme Council of Royal League*, 100 Mo. App. 76, 73 S. W. 259, the opinion filed March 3, 1903, held that a change in the by-laws as to suicide, made after the certificate was issued, did not offset liability for the full amount called for in the certificate; that when the order had so interpreted its contracts as to render itself liable thereunder it could not change its by-laws to the disadvantage of the member or beneficiary, unless the change was reasonable; that even though the certificate holder committed suicide while sane, by providing in the certificate that the company should not be liable if the insured committed suicide within two years after the issue of the certificate and thereafter passing by-laws to the effect that if the insured committed suicide his beneficiary should be entitled to only one-half of the face of the policy, that this change in the by-laws was unreasonable and did not affect the certificate as orig-

inally issued. Since the decision in *Morton v. Supreme Council*, *supra*, there have been several decisions of our court and of the other Courts of Appeals holding that changes of the character of the one before us in the by-laws or constitution of the order, unless those changes, or other changes effected in the contract, were reasonable, were invalid.

In *Claudy v. Royal League*, *supra*, our Supreme Court (l. c. 107), specifically approving our decision in *Richmond v. Supreme Lodge*, *etc.*, *supra*, has, if not by name, by implication, overturned all of these subsequent opinions, or distinguished this from those cases of which *Pearson v. Knight Templars & Masons Indemnity Co.*, 114 Mo. App. 283, 89 S. W. 588, is a type, as being organizations in which an amount certain was contracted for and not as here and in the *Claudy* case, that amount dependent upon the amount collected by assessment.

Our court, in *Lewine v. Supreme Lodge, Knights of Pythias of the World*, 122 Mo. App. 547, l. c. 554, 99 S. W. 821, held that like certificates create contracts and establish obligations as do others and "are immune from future impairment, modification or change identically as other contracts are, without the assent of the parties in interest." We further there held that while the beneficiary "has no vested right in the fund prior to the happening of the contingency upon which the benefit is to accrue; or in other words, that the beneficiary has but an expectancy, subject to the right of the member insured to terminate it if he sees fit so to do," that "this proposition is not true, however, with respect to the insured. Indeed, while the insured has no vested right in the fund, such as would become assets of his estate after his decease (*Bacon on Benefit Societies* (3 Ed.), 237), he has clearly a vested right in the contract with the association whereby he is given the power to designate who shall receive, and the amount that shall be received by those whom he des-

ignates as the recipients of his bounty, and this is considered as in the nature of a property right." Our conclusion was, that the contract could not be substantially altered or its obligation abridged by a subsequent law as to suicide.

In the Claudy case, *supra* (l. c. 106), it is said: "It is well established that no vested rights are conferred by a certificate of the character of the one under consideration. [Grand Lodge v. McFadden, 213 Mo. 269, 284, and cases; Westerman v. Supreme Lodge, 196 Mo. l. c. 738.]"

Referring to the Westerman case, *supra*, the decision of our court in Morton v. Royal Tribe of Joseph, 93 Mo. App. 78, this is quoted approvingly from the opinion in that case: "If the certificate was like an ordinary policy of insurance, or if it had vested any beneficial interest in any one prior to the death of the member, we would readily yield to the contention [that is that what is now section 6945, Revised Statutes 1909, applied], but it is the settled law that neither the member nor the beneficiary had any vested interest in the certificate of insurance prior to the death of the member."

In Grand Lodge v. McFadden, *supra*, the point in issue was the right of the member to change the beneficiary. That was upheld on the ground that the beneficiary has no vested interest prior to the death of the member, the Supreme Court adopting the view of our court as expressed in the same case. [See 114 Mo. App. 191.]

We cannot regard the decision in the Claudy case in any light other than as overruling what we had in decision in Lewine v. Supreme Lodge, *supra*.

In a very recent opinion by the Supreme Court of Minnesota, Ledy v. National Council of Knights & Ladies of Security, — Minn. —, 151 N. W. 905, that court held that a change in the by-laws of the society, made after one became a member, by which the amount

of payment in case of suicide was altered, was binding upon both the member and his beneficiary. A very full citation of cases in support of that will be found in the opinion, giving that as the rule sustained by the weight of authority, the decision of our court in *Lewine v. Supreme Lodge* being cited as one of a few decisions to the contrary.

While the decision of our court in the *Lewine* case, *supra*, is not referred to in the *Claudy* case, it was cited by counsel for appellants in that case (l. c. 95) among other authorities relied upon.

In the *Claudy* case as in the case at bar, it was provided in substance, that the member agreed to comply with, and that the rights of himself and beneficiaries were subject to, all the laws, rules and regulations in force in the order at the time of his becoming a member "or which may hereafter be adopted by it."

In both cases it is provided that a sum not exceeding the amount named should be payable "in accordance with and under the provisions of the law governing said fund." Says our Supreme Court in the *Claudy* case (l. c. 106), "This contract, therefore, contemplated that the association might change its by-laws, rules and regulations so as to affect the amount of insurance to be paid, especially in the event of the member's death by suicide, and the member agreed to be bound by such changes."

In the *Claudy* case, at the time of the issuance of the benefit certificate, the by-laws of the association provided: "If any member, whether admitted heretofore or hereafter, shall die by his own hand, sane or insane, his beneficiary or beneficiaries shall receive only one-half of the face value of his benefit certificate." The by-laws, after several changes, at the time of the death of the member and then in force provided:

"No member, whether admitted heretofore or hereafter, shall die by his own act or hand (sic), sane or insane, and if any member, whether admitted here-

tofore or nereafter, shall die by his own act or hand, sane or insane, such death shall forfeit all the rights and claims to the amount agreed to be paid on his death and specified in the benefit certificate of such member, and his beneficiary or beneficiaries shall receive and be paid in lieu thereof, such a proportion of the sum named in his benefit certificate as the total amount which he has paid into the Widows' and Orphans' Benefit Fund bears to the amount he would have paid had he lived out his entire life expectancy at his age of entering."

This quoted provision of the by-laws of the Royal League is not as liberal to those of its members who commit suicide as the new by-law in the case at bar. Still our Supreme Court held it to be a reasonable provision, a reasonable change, in the by-laws.

In the case at bar, unlike any such statement in the Claudy case, is the distinct averment in the answer, admitted by the motion for judgment, that the member Dessauer, "had knowledge and notice of the adoption and promulgation of said by-law (section 396), and acquiesced in the same, and continued to pay his assessments and dues thereafter up to the time of his death." Whether this operated as an estoppel, in the absence of any facts averred in avoidance, is not necessary to determine here. We refer to it as going somewhat further than the constructive notice a member is often said to have of the organic laws of his society.

In the Claudy case, as here, there was a motion for judgment on the pleadings which was sustained by the trial court, it rendering judgment in favor of plaintiff in the sum of \$1000, basing this on the by-law as to suicide in force at the time of the issue of the certificate. That was the action of the court in the case before us, the amount, however, different. Our Supreme Court said (l. c. 108), "No contractual relation between the member or the beneficiary and the association having been violated by the change in the by-laws and the

same being reasonable and for the best interests of the association, we hold that its action in this regard should be sustained, and so holding it follows that the judgment below should be reversed and remanded, and the trial court directed to enter up judgment in favor of plaintiff" in the sum found to be due "upon the basis of calculation fixed by the by-law in force at the time of the death of the member."

In the light of this decision, it is unnecessary to go into any further discussion of this case.

The judgment of the circuit court should be reversed and the cause remanded, with directions to that court to enter up judgment in favor of plaintiff for the amount tendered, to-wit, \$744, costs to be taxed against the plaintiff, *Allen, J.*, concurring, but as *Nortoni, J.*, dissents in a separate opinion and asks that the cause be certified to the Supreme Court as in conflict with *Mathews v. Modern Woodmen of America*, 236 Mo. 326, 139 S. W. 151, that is accordingly done.

DISSENTING OPINION.

NORTONI, J.—I do not regard the case of *Claudy v. Royal League*, 259 Mo. 92, 168 S. W. 593, as directly in point and controlling on the precise question in judgment, and, therefore, dissent from the opinion of the court. I deem the correct rule of decision on the subject-matter here involved to be declared in the case of *Smith v. Sup. Lodge, K. of P.*, 83 Mo. App. 512, in which the opinion was prepared by Judge BOND, and the case of *Morton v. Sup. Council of Royal League*, 100 Mo. App. 76, 73 S. W. 259, in which the opinion was prepared by Judge GOODE, and *Zimmermann v. Sup. Tent, etc.*, 122 Mo. App. 591, 99 S. W. 817, in which the opinion was prepared by Judge BLAND, and the case of *Lewine v. Sup. Lodge, K. of P.*, 122 Mo. App. 547, 99 S. W. 821. When it is remembered that forfeitures are not favored in the law and that words are

not appraised at more than their face value in order to accomplish such a result, it seems those cases are correctly decided. [See *Mathews v. Mod. Woodmen*, etc., 236 Mo. 326, 139 S. W. 151.]

Such is the correct principle which, in my judgment, should control in cases of this character; and when it appears that a man does no more than agree to comply with future by-laws of an order, it should not be interpreted from this that he agreed his insurance should be entirely swept away by such future by-law. The word "comply" and words of similar import mean no more in their ordinary sense than that one will conform his conduct as a member of the order to such future by-laws, and not that he agrees his insurance may be defeated entirely thereby. The statement that the insured member of a beneficiary order has no vested right whatever in the certificate or contract of insurance, though frequently made, cannot be true in entirety, for he certainly has a right to insist that his contract shall be enforced according to its terms, whatever such may be. It cannot be that the order alone, without his consent given in same manner, may change the contract so as to destroy the rights accruing thereunder, as though he has no vested right therein. It is true the beneficiary enjoys no vested interest in the fund, and neither does the insured member, for the fund is not available to him during his lifetime. But obviously the insured enjoys a vested right in the contract to have it interpreted under the law and to have it enforced according to its terms whatever such terms may be.

The Supreme Court, in *Mathews v. Modern Woodmen*, 236 Mo. 326, 139 S. W. 151, in an able opinion prepared by a great judge, recognized this doctrine, for though in that case the agreement incorporated in the contract or certificate of insurance provided that the insured should conform in all respects to the laws, rules and usages of the order "now in force or which

may hereafter be adopted," it was declared incompetent for the order to destroy his insurance as by enacting a subsequent by-law, inhibiting the occupation of a bartender.

Concerning this matter, the court said:

"If it impair the substantive property rights of the member in his insurance contract as that contract existed before its passage, then, by the law of the land, it becomes inoperative in so far as it impairs the obligation of a contract previously entered into between the company and Mathews. Such is the *rationale* of Schmidt v. Supreme Lodge, 228 Mo. 675, supra. The question is there so exhaustively considered that no new or further exposition is necessary. Our conclusion is, in any view of it, that said by-law should not control our disposition of this case." [See Mathews v. Mod. Woodmen, 236 Mo. 326, 349, 139 S. W. 151.]

I deem the opinion of the court to be in conflict with the decision of the Supreme Court in the case last cited and that it impairs a just rule of decision well established in a multitude of cases and, therefore, request the case be certified to the Supreme Court for final determination, according to the mandate of the Constitution.

P. A. GRISWOLD, Commissioner, Respondent, v.
MAX HAAS, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 6, 1915.
Opinion Filed May 4, 1915. Dissenting Opinion Filed June 8, 1915.

1. INTERPLEADER: Sale of Property In Dispute: Right to Appoint Commissioner. A person who had possession of certain bonds but disclaimed ownership tendered the bonds into the circuit court and filed a petition, setting up that the bonds were

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claimed by different parties, and praying that such parties be required to interplead. The claimants interpleaded, each setting up that he was owner of the bonds. Pending a determination of their claims, the court appointed a commissioner to sell the bonds and pay the proceeds into court to await the determination of ownership. The bonds were sold at the commissioner's sale to defendant, purporting to act as agent for a third person. The third person repudiated the agency, and the commissioner brought suit against defendant for the amount of his bid, less an amount which defendant had paid. *Held*, that, in view of the fact that the case was within the jurisdiction of the court, the parties were before it, the fund was in its custody, and the point decided was within the issues before the court, the point made by defendant, on appeal, that the court did not have jurisdiction to make the order appointing the commissioner and for the sale of the bonds, was untenable.

2. **TRIAL PRACTICE: Weight of Evidence.** The determination of the weight of evidence is for the trial court, when acting as trier of the facts.
3. **PRINCIPAL AND AGENT: Liability of Agent for Unauthorized Acts: Damages.** Where one purported to act for a principal in bidding in bonds at a sale by a commissioner appointed by the circuit court, when, in fact, he was unauthorized, the measure of damages, in an action against him by the commissioner, was the amount of his bid, which was the amount for which the commissioner was liable; the value of the bonds being immaterial.

Held, by ALLEN, J., dissenting, that plaintiff was not entitled to recover the amount defendant bid, but was entitled to recover only such damages as he sustained by reason of the wrongful assumption of authority by defendant, which damages could have been ascertained by a resale.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

AFFIRMED. CERTIFIED TO SUPREME COURT.

Henry H. Furth for appellant.

(1) The plaintiff showed no title in himself to maintain the action. His appointment as special commissioner is utterly void and open to collateral attack. The certified copy of his appointment should have been excluded. *Charles v. White*, 214 Mo. 187; 112 S. W.

545; *Hope v. Blair*, 105 Mo. 93; *Stark v. Kirchgraber*, 186 Mo. 633; *Reynolds v. Stockton*, 140 U. S. 254; *Mundy v. Vail*, 34 N. J. L. 418; 1 Black on Judgments, p. 242; *Freeman on Void Judicial Sales*, pp. 7, 20, 21, notes 3 and 4; *Thomas v. Gann*, 156 S. W. 74. (2) The damages allowed are excessive. There is no evidence whatever in the record from which the amount of the damages can be ascertained. The measure of damages in this case is the loss which has accrued to the third person as a natural and probable consequence of the want of authority. 31 Cyc., page 1551.

John B. Denwir, Jr., and *P. A. Griswold*, *pro se*,
for respondent.

The circuit court did not exceed its jurisdiction in ordering a sale of the bonds and its action in so doing is not subject to collateral attack. *Foltz v. Railroad*, 60 Fed. 316, 318; *Rosenheim v. Hartsock*, 90 Mo. 357; *State v. Weatherby*, 45 Mo. 17; *Evans v. Haefner*, 29 Mo. 141; *Charles v. White*, 214 Mo. 187, 206.

REYNOLDS, P. J.—This is the second appearance of these parties before our court on a controversy growing out of the same transaction. When the first case was here we reversed the judgment and remanded the case on two grounds: First, error of the trial court in the rejection of certain testimony as to agency; second, that being an action to recover the purchase price of property alleged to have been sold, we held it did not lie, but that the proper action under the facts would be either for deceit or upon the express or implied warranty of authority to make the purchase. [See *Griswold v. Haas*, 145 Mo. App. 578, 122 S. W. 781.] Instead of amending, plaintiff saw fit to institute a new action before a justice of the peace asking damages on the theory of a breach of the implied warranty of agency on the part of defendant in the bidding

in of the bonds. From a judgment in favor of plaintiff in the justice's court, the case went on appeal to the circuit court, where being tried before the court, a jury having been waived, the court found for plaintiff and defendant appealed.

The main facts attending the transaction were developed on this last trial practically as they appeared in the former trial. We refer for them to *Griswold v. Haas*, *supra*. It may be said that on this last trial Mr. McLain, in possibly more emphatic terms than used at the former trial, denied the agency of Mr. Haas. At this second trial counsel for defendant also challenged the validity of the proceedings of the circuit court under which plaintiff Griswold had been appointed commissioner and authorized to sell the bonds. The record of that case, designated as cause No. 39,021 in the circuit court of the city of St. Louis, was in evidence at this last trial and it appears from that that the bonds here involved having been brought into court by a party in whose possession they were but who disclaimed ownership of them, that party setting up that they were claimed by different parties, asked that these parties be required to intervene. They did intervene, each of them contending for ownership of the bonds. Pending that the circuit court appointed Mr. Griswold, plaintiff here, commissioner, ordered him to sell the bonds, holding the sum in court pending the determination of the questions raised by the interpleaders.

At this last trial this proceeding was attacked on the ground that the court was without jurisdiction to appoint a commissioner or order a sale of the bonds. We will dispose of that by saying that we do not think that there is anything in the contention. That case was within the jurisdiction of the court; the parties were before it; the fund was in its custody; the point decided was within the issues before the court. These facts present, jurisdiction in the circuit court to make

the order is clear. [Charles v. White, 214 Mo. 187, 112 S. W. 545.]

The defendant asked and at his instance the court gave declarations of law to the effect that if the court believed and found from the evidence that McLain, the party in whose name Haas had bought in the bonds, before the sale expressly authorized defendant to purchase the bonds for him, the verdict should be for defendant; or if the court found that McLain, before the sale, had not expressly authorized defendant to purchase the bonds for him at the sale but that his conduct after the sale, on hearing that defendant had purchased the bonds for him, amounted to a ratification of the purchase, the verdict should be for defendant. Further, that if the court found from the evidence that McLain, after the purchase of the bonds for him by defendant, and with knowledge thereof, approved or recognized the purchase thereof, or acquiesced therein, such conduct on the part of McLain is evidence of ratification by him of the purchase made on his behalf by defendant.

The defendant also asked the court to declare as a matter of law that under the pleadings and evidence plaintiff could not recover more than nominal damages; that if the finding is for plaintiff the court should award him damages in the sum of \$1. This was refused.

At the request of defendant the court also made findings of fact as follows: That in the case No. 39,021, under which the order for sale of the bonds had been made and which was pending in the circuit court of the city of St. Louis, "the bonds in question were by the court ordered to be sold upon prescribed public notice at the east front door of the courthouse, for cash to the highest bidder, by the plaintiff herein as commissioner, who was directed to report forthwith to the court his actions in the matter; that no appeal was taken from the judgment and order of this court in cause No. 39,021; that pursuant to said judgment

and order plaintiff herein as such commissioner did, on February 21, 1907, offer said bonds for sale and at said sale defendant was the highest and best bidder and thereupon said bonds were struck off to him for the price of \$276, and at said time defendant paid to plaintiff the sum of \$15 on account of said purchase; that on inquiry concerning the name of the purchaser defendant stated the purchaser was George F. McLain, and that subsequently the sale was duly approved by Division No. 5 of this court.

“That afterwards said plaintiff made a tender of said bonds to said McLain and demanded of him the balance of the purchase price, namely \$261, and that said McLain repudiated the agency of defendant.

“The court further finds that defendant was not authorized to purchase said bonds for said McLain, and therefore was not the agent of said McLain in said purchase; and that after said sale said McLain did not recognize and approve defendant’s purchase of said bonds as his agent.

“The court further finds that plaintiff has been damaged in the sum of \$261.”

Judgment followed accordingly. It is from this judgment that defendant has duly appealed to this court.

We see no occasion to disturb the finding of the court or error in its action in the giving and refusing of instructions. It gave instructions which defendant asked but found the facts against him. Its finding of facts is full, meets the issues, and is supported by substantial testimony, the weight of which was for the determination of the trial court as trier of fact.

The court properly refused the instruction as to nominal damages. The measure of the damage here was the difference between the amount of the bid and the amount defendant paid on the bid. That was the amount for which plaintiff, as commissioner, is responsible. The value of the stock or bonds sold was

immaterial. The amount of damage to which plaintiff was entitled, if he recovered, was a fixed and ascertained sum.

This case originated before a justice of the peace, as did the former action over this matter between these parties. In both cases the finding has been for plaintiff. Plaintiff was acting as an officer of the court. Defendant, by bidding in the property, put the plaintiff to the cost and trouble of this litigation, which cost should otherwise be charged to the trust fund. The judgment below was manifestly for the right party, and in view of section 2082, Revised Statutes 1909, which directs that no judgment shall be reversed unless the court believes that error against appellant and materially affecting the merits of the case appears, we do not believe such error appears. Moreover, section 2083, Revised Statutes 1909, authorizes us as an appellate court, to give such judgment as the trial court ought to have given, when it appears that the judgment is for the right party, as we think is the case here. [Joy v. Cale, 124 Mo. App. 569, 102 S. W. 30.]

The judgment of the circuit court is affirmed. *Nortoni, J.*, concurs. *Allen, J.*, dissents.

DISSENTING OPINION.

ALLEN, J.—I am unable to concur in the majority opinion herein which I think is in conflict with our decision in this case on the former appeal. [Griswold v. Haas, 145 Mo. App. 578, 122 S. W. 781.] It was there held that if the defendant contracted for the purchase of the bonds in the name of his supposed principal, but without authority, he did not thereby bind himself as purchaser, and could not be sued upon the contract. Such ruling appears to accord with prior decisions of our courts, and to be in line with the weight of authority on the question involved.

I understand the rule to be that if an agent contracts for and in the name of a disclosed principal, expressly or by his acts asserting authority when in fact none exists, an action will not lie against him *on such contract*, but he is liable to respond in damages for his wrongful act in assuming to contract for another without authority. It was so held in *Griswold v. Haas*, *supra*, following the authorities there referred to; and see *Byars v. Doores' Admr.*, 20 Mo. 284; *Wright v. Baldwin*, 51 Mo. l. c. 272; *Hotel Co. v. Furniture Co.*, 73 Mo. App. l. c. 138; 1 *Mechem on Agency* (2 Ed.), sec. 1398, where many cases are collected in footnotes. The appropriate remedy is said to be an action on the case for fraud and deceit, though the tortious feature of the case may be waived and the suit proceed *in assumpsit* as for a breach of the express or implied warranty of authority. [See authorities, *supra*.]

While the majority opinion does not in terms controvert this, it sanctions a recovery by plaintiff of the unpaid portion of the purchase price upon delivery of the bonds to defendant. In effect it allows a recovery against the defendant on the contract. If an action could have been maintained against defendant as the vendee, for a breach of the contract of sale, doubtless one remedy available to plaintiff would have been to hold the bonds for defendant, tender them, and sue for the unpaid portion of the purchase price. I do not perceive how this course can be sanctioned upon the theory of a recovery of damages for the alleged wrongful act of defendant, the agent, in assuming to act without authority.

The statement filed before the justice of the peace was perhaps intended to state a cause of action for damages for a wrongful assumption of authority by defendant. But it does not appear that plaintiff has shown any damage suffered. The loss entailed, if any, could have been ascertained by a resale of the bonds. I perceive no reason why this could not have

Slothower v. Clark.

been done, nor any reason for making an exception to the rule above stated because of the fact that the sale was by a commissioner. Certainly the record does not disclose any effort to ascertain the damages recoverable in an action of the character such as this court held to be the appropriate remedy, when the case was here on the former appeal. And I think the error is here one materially affecting the merits of the action, and affecting the substantial rights of the appellant, and that therefore sections 2082 and 1850, Revised Statutes 1909, cannot be invoked to sustain the judgment.

There are other questions here, but under the circumstances it is unnecessary for me to discuss them. I dissent from the conclusions reached by my associates, and as I deem the decision herein to be contrary to the decisions of the Supreme Court in *Byars v. Doores' Admr.*, 20 Mo. 284; *Wright v. Baldwin*, 51 Mo. l. c. 272; and to the decision of the Kansas City Court of Appeals in *Newland Hotel Co. v. Furniture Co.*, 73 Mo. App. 135, I ask that the case be certified to the Supreme Court for final determination by that tribunal.

LEWIS SLOTHOWER, Respondent, v. EDGAR W.
CLARK, Appellant.

Kansas City Court of Appeals, February 1, 1915.

1. **NEGLIGENCE: Automobile: Chauffeur: Orders: Liability.** A chauffeur in the employ of the owner of an automobile drove the owner to church in Kansas City. On getting out at the church, the owner ordered the chauffeur to go after his son at a place about nine blocks west of the church, bring the son to the church and there wait to take them home when services were over. The chauffeur drove several blocks in an opposite direction to collect a debt owing to him by a friend, collected the debt and invited his friend to ride back with him on the

Slothower v. Clark.

same seat. At his friend's request he let him handle the steering wheel and drive the machine. On their way back to where the owner's son was, the machine collided with a hearse and injured those in charge of it. It was *held* that the owner was liable, even though his machine was being driven by the chauffeur's friend at the time of the collision.

2. ———: ———: ———: ———. Orders of care in driving an automobile and directions not to let any one else drive it will not excuse the owner from an act of the chauffeur injuring another, though it occurred on account of violating such orders.
3. ———: Indirect Course: Private Errand. The fact that the chauffeur in obeying instructions of the master to go to a certain place, drives the automobile out of a direct course, to another place on an errand of his own will not free the master of liability for an injury to a third party in a collision occurring on the way back to the place he was directed to go.
4. ———: Chauffeur: Invited Friend: Negligence. If a chauffeur in charge of the master's automobile invites a friend to ride on the seat with him and permits the friend to take charge of the steering wheel and run the machine, and the latter negligently collides with a hearse and injures those in charge of it, the master is liable.

Appeal from Jackson Circuit Court.—*Hon. Thos. J. Seehorn*, Judge.

AFFIRMED.

Hadley, Cooper & Neel for appellant.

Sebree, Conrad & Wendorff for respondent.

ELLISON, P. J.—Plaintiff's action is for personal injury received in a collision between a hearse on which he was riding and defendant's automobile. The judgment in the trial court was for plaintiff.

It appears that defendant had a chauffeur in his employ who drove the machine for him. That on Sunday morning the chauffeur drove him and his wife to church near Tenth and Harrison streets, Kansas City, Missouri, arriving there at eleven o'clock. Before

going into the church defendant directed the chauffeur to go to the "Commerce Building," about nine blocks west from the church, and get his son, then return back by the church and wait to take them home. Instead of performing these services directly, the chauffeur went a distance of six blocks east and five blocks south of the church to collect a debt owing to him by a man named Sweeny. In doing this he was practically going in an opposite direction from the Commerce Building. He collected what was due him and invited Sweeny in the machine to ride on the seat beside him and started for the Commerce Building where he was to get defendant's son. Sweeny asked the chauffeur to let him drive the machine and the chauffeur did so by exchanging seats and letting him take charge of the steering wheel. On the way the machine collided with a hearse at Fourteenth and Paseo streets whereby plaintiff was injured.

There was ample evidence to take the case to the jury on the question of negligence on the part of the driver of defendant's machine in colliding with the hearse, unless it be that the driver, at the time of the collision was Sweeny and that defendant would not be liable for his conduct, a phase of the case we will refer to again. We will therefore pass to the important question whether the chauffeur was engaged in the line of his employment in defendant's service at the time the injury was inflicted upon plaintiff. First, we have testimony in defendant's behalf that the chauffeur had orders from him to run the machine carefully and not to allow anyone else to operate it. We will assume this to be a fact; but state the law that mere orders to the servant will not absolve the master from liability for the servant's acts. If it did, it would be a simple process for employers to rid themselves of all responsibility for the conduct of their agents. The question is not what orders did the master give as to his conduct, but whether the servant was engaged in per-

forming service for him at the time of the injury, and this is determined, not by his orders for behavior, but by the behaviour itself, even though contrary to orders. [Whimster v. Holmes, 177 Mo. App. 130, 134, 135.] In that case the chauffeur, by authority of the owner, had taken an automobile to a public garage to be inspected and was returning home to put up the machine when he discovered he had lost the keys to the machine and his master's private garage; and thinking he may have left them at the public garage, turned back to go there and search for them. On his way, he injured a pedestrian and we held he was prosecuting his employment in his master's service. We refer to that case for the reasons and authorities supporting our present conclusion that defendant's chauffeur was in the course of his employment, as defendant's servant, when he collided with plaintiff. His particular service was to go after defendant's son and bring him by the church, there to await defendant's coming from the church and then to take them home. In going after the son he went out of his way to perform a service for himself in collecting a debt. In the Whimster case, at page 138, we quoted the following from Richie v. Waller, 63 Conn. 155: "In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not in and of itself be such a departure from the master's business as to relieve him of responsibility." And "if the servant in going *extra viam* is really engaged in the execution of his master's business within the scope of his employment, it is immaterial that he joined with this some private business or, purpose of his own. Thus in Patten v. Rea, 2 Common Bench (N. S.), 605, the servant started out on business of the master, and also to see a doctor on his own account. While on his way to see the doctor he negligently drove

against a horse and killed it, and the master was held responsible."

There is this apt statement in an English case quoted with approval in *Garetzen v. Duenckel*, 50 Mo. l. c. 108: "When a servant *quits sight* of the object for which he is employed, and, *without having in view* his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." [Italics ours.] If we insert the word "business" in place of "malice," we connect the statement directly with the present question. Now in this case, the chauffeur had not "quit sight" of defendant's business and "without having in view," his orders, gone off on business of his own. He had defendant's directions in mind all the while and was executing them; only going a round-about way to do so. Certainly, when he was on his return, on his way to the Commerce Building, as he was at the time of the collision, he had his orders in view and was performing them. He was in the very act of going after defendant's son. If he was not in defendant's service then, it has not been suggested how close he should have gotten to the Commerce Building before he would have been considered in such service.

But it is insisted, that at the time of the collision, Sweeny was running the machine, the chauffeur, as we have seen, having permitted him to take charge of the steering wheel, he sitting beside him. At the trial the parties seemed to consider it was necessary to show that at the time of the collision, the chauffeur was driving. In view of the evidence we think that is a matter of no consequence or importance. When the chauffeur let Sweeny take the wheel, he remaining on the seat beside him, Sweeny's acts, practically speaking, were his, and his act in turning the wheel over to Sweeny was the act of defendant, for it was done in the defendant's service and while carrying out the chauffeur's

employment. It was not the act of a servant abandoning his master's service and turning it over to another.

In *James v. Muehlebach*, 34 Mo. App. 512, 518, we said that, "If a servant in charge of his master's carriage should take a stranger with him into the driver's seat, hand him the reins and tell him to drive at a run and an injury happen in consequence of the speed, the master must answer for the damage, for the negligence was that of his servant.

"But not so if the servant had quit the carriage and substituted the stranger in charge, generally, in his stead, without the knowledge of the master. For if an injury happen it is not the act of the servant for whom only is the master liable. In *Booth v. Mister*, 7 Carr. & P. 66, a servant in charge of his master's cart gave over the reins to one in the cart with him, an injury happening in consequence of the negligent driving, the master was made to respond.

"Lord ABINGER said, 'As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself.' " That statement of the law is supported by *Hollidge v. Duncan*, 199 Mass. 121; *Thyssen v. Ice Co.*, 134 Iowa, 749; *Campbell v. Trimble*, 75 Tex. 270, 272; *Wellman v. Miner*, 44 N. Y. Supp. 417; *Bamberg v. International Ry.*, 103 N. Y. Supp. 297; *Kilroy v. D. & H. C. Co.*, 121 N. Y. 22; *Bk. of Cal. v. W. U. Tel Co.*, 52 Cal. 280, 290.

What we have said disposes of the question as to the propriety of the court's actions on the instructions refused for defendant. We think there was no error in the instance of the court's ruling on objections to the evidence; nor was there any error on the part of the court in remarks objected to as being a comment on the evidence. Nor do we think, in view of the evidence, that the verdict for \$2500 was excessive.

We have not discovered any error justifying our interference and hence we affirm the judgment. All concur.

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OSCAR W. UHRICH and BURNS H. UHRICH,
Partners Doing Business as THE UHRICH
PLANING MILL COMPANY, Appellants, v.
GLOBE SURETY COMPANY OF KANSAS
CITY, MISSOURI, a Corporation, Respondent.

Kansas City Court of Appeals, May 4, 1915.

1. **PRINCIPAL AND SURETY: Mechanic's Liens: Contractors: Materialmen.** The plaintiffs, who sold to a contractor materials which were used in the construction of a building, sued the defendant on a bond, which the defendant furnished to the contractor to protect the owner against Mechanic's Liens. The plaintiffs filed a Mechanic's lien against the building and brought a suit thereon. *Held*, that the bond was for the benefit of the obligee, the owner, and not for the materialman.
2. ———: ———: ———. A contract between two parties upon a valid consideration may be enforced by a third party when entered into for his benefit, although such third party is not named in the contract and was not a party to the consideration. It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim. But this does not extend so far as to give a third person who is only indirectly and incidentally benefited by the contract a right to sue upon it.

Appeal from Clay Circuit Court.—*Hon. Frank P. Divelbiss*, Judge.

AFFIRMED.

New, Krauthoff and John Taylor for appellants.

Haff, Meservey, German & Michaels, Ralph Hughes
and *M. E. Lawson* for respondent.

JOHNSON, J.—This is an action on a building contractor's bond to recover for materials purchased by the contractor and used in the construction of the building for which the bond was given. The court sustained the demurrer to the petition filed by defendant, the surety on the bond, plaintiffs refused to plead further, judgment was rendered for defendant and plaintiffs appealed.

The material facts alleged in the petition are as follows: Lena G. Hill entered into a contract in writing with George W. Huggins, a building contractor, by the terms of which he agreed to build an addition to, and make certain alterations in, a hotel building in Excelsior Springs, at a cost of \$52,775. The following quotations from the contract contain all of its provisions relating to the obligation of the contractor to pay for labor and materials employed and used in the construction of the building:

"The said contractor covenants and agrees to and with the said owner to make and erect, build and finish . . . pay for all labor and material in a certain addition to the Royal Hotel as called for in the original plans and specifications. . . . The said owner agrees and binds herself for and in consideration of the erection of said buildings as aforesaid, to pay unto the said contractor the sum of \$52,775 . . . provided . . . that all those employed by or furnishing materials to the said contractor shall have been paid and satisfied, so that they shall have no lien upon the buildings or works, and in case the said contractor shall fail so to pay and satisfy all and every claim and demand against said buildings as aforesaid, the said owner may, if she deems proper so to do, retain from the money due and coming to said contractor enough to pay and satisfy such claims and demands, it being, however, understood that nothing herein contained shall in any way be construed as impairing the right of the said owner to hold the said contractor or

securities liable on his bond for any breach of the conditions of the same.

“Subcontractors and parties furnishing materials on account of this contract may be paid by the owner *pro rata*, as above stated, upon order from the contractor, or on presentation of O. K. bills from the contractor, and all such payments to be charged to account of this contract. All payments by the owner to the contractor or to his orders, to be made upon written certificates from the architects, based on the amount of labor performed and materials in and about the premises. Final payment will be made within ten days after this contract is fulfilled.”

The bond in suit was executed by the contractor as principal and defendant as surety to the owner as sole obligee on the expressed condition “that if the said contractor shall duly perform said contract and fulfill all the several stipulations therein provided then this obligation is to be void, but if otherwise, the same shall remain in full force and virtue. It is hereby expressly agreed that the said L. G. Hill may make payments in any amounts to the contractor, subcontractor, and materialmen and laborers and such payments shall in nowise limit, affect or reduce our liability hereunder.”

The contractor purchased materials of plaintiffs, used them in the construction of the building and failed to pay for them. Plaintiffs filed a materialman’s lien against the building and brought a suit, which is now pending, against the contractor and owner for the enforcement of the lien. The present suit on the bond was instituted during the pendency of that action.

The grounds of the demurrer to the petition are, (1st) a defect of parties; (2nd) that a cause of action is not stated against the defendant Surety Company, and (3rd) that the pending suit to enforce the mechanic’s lien is a bar to the present action. In the view

we take of the case it will not be necessary to discuss the first and third grounds.

Plaintiffs say in their brief: "The theory of the action is that while plaintiffs are not named in said contract and bond they are entitled to sue thereon because they are parties for whose benefit said contract and bond were made." Or, to state it differently, the pleaded cause is based on the theory that since the building contract compelled the contractor for the stated consideration to preserve the property which was the subject of the contract from the liens of mechanics and materialmen who should furnish labor and material for the improvements, at the request of the contractor, and since the obligation imposed on defendant in the condition of the bond was coextensive with that the contractor assumed towards the owner under the building contract, the bond should be deemed to have been taken for the benefit of such mechanics and materialmen, for the reason that the payment of debts the contractor might incur in the construction of the improvements is shown by these contractual agreements to have been a direct, instead of an incidental, object of the contracting parties including defendant, the surety on the bond.

The rule is well settled that "a contract between two parties upon a valid consideration may be enforced by a third party when entered into for his benefit. This is so though such third party be not named in the contract and though he was not privy to the consideration. It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty legal or equitable which would give him a just claim." [City to use v. Von Phul, 133 Mo. 561; Rogers v. Gosnell, 58 Mo. 590; State ex rel v. Gaslight Co., 102 Mo. 482; Ellis v. Harrison, 104 Mo. 276; Lumber Co. v. Schwartz, 163 Mo. App. 659.]

This rule, as we observed in the recent case of *Bank v. Chick*, 170 Mo. App. 343, has well-defined limitations. In *Porter v. Woods*, 138 Mo. l. c. 554, the Supreme Court quoted with approval the following excerpt from the opinion in *Simpson v. Brown*, 68 N. Y. 355: "It is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit, as its object, and he must be the party intended to be benefited."

It is said in *Benton v. Larkin*, 36 Kan. 246: "The rule, however, is not so far extended as to give a third person who is only indirectly and incidentally benefited by the contract a right to sue upon it." This statement of the exception to the general rule also received the sanction of our Supreme Court in the opinion to which we have just referred. The same idea is expressed in the more recent case of *Beattie Mfg. Co. v. Clark*, 208 Mo. l. c. 108, where it is said: "If it appear from the contract itself that it was made for the benefit of the contracting parties therein, and no other, an action by a third party cannot, of course, be maintained thereon."

In solving the question of whether the parties to the bond had their own benefit for their sole object or purposed to include as contractual beneficiaries parties who were not in privity with the contract or the consideration, we must endeavor to ascertain and then enforce the intention of the parties as expressed in the contract evidenced by the bond. In the judicial interpretation of written contracts the most important rule is that which requires the court to give effect to the mutual intention of the parties as expressed in the instrument, and in ascertaining the true intention, the contract should be read in the light of the circumstances of the parties at the time of its execution,

in instances where there is uncertainty or ambiguity in the language of the instrument. [Bank v. Chick, *supra*.]

Applying the rules we have stated to the contract in hand, we find ourselves unable to join with plaintiffs in the conclusion that the payment of debts of the class to which that of plaintiffs belongs was intended by the parties to the contract to be one of its direct objects. We think the payment of such debts was only incidental to the object of protecting the property of the owner from liens for debts the contractor would be compelled to pay in order to perform his agreement to construct the improvements at his own charge and expense. The owner of the property was confronted with the possibility that the contractor might fail to perform the contract and thereby subject her property to the burden of numerous mechanic's liens. It was to protect herself against such contingency that she required the bond. The mechanic's lien statutes would protect the future creditors of the contractor by affording them resort to her property for the payment of their demands. She was interested in the payment of such demands only to the extent of her own protection. That such interest was the only one the parties had in mind is shown by their omission to insert an express provision giving mechanics and materialmen a right to sue on the bond. In all of the cases in this State relied on by plaintiffs we find either that such provision appeared in the contract or that the bond was given to secure the performance of a contract for a public improvement upon which no mechanic's lien could attach and contained a provision requiring the contractor to pay for the labor and materials used in such improvement.

An example of the first class is the case of *City to use v. Von Phul*, 133 Mo. 561, where the bond contained the express agreement that "the same may be sued on at the instance of any materialman, laboring

man, or mechanic," etc., and an illustration of the second class is the recent case of Lumber Company v. Schwartz, 163 Mo. App. 659, where a bond given to secure a contract for a public improvement required the contractor to deliver the building to the Board "free from all debts and liens of every character on account of materials furnished or labor performed in and about the said building." We held that inasmuch as the mechanic's lien law afforded no protection to mechanics and materialmen in such instances, the provision quoted must have been intended to be for the benefit of such parties, since it could not have been of any benefit to the State. We said in the opinion: "To hold that the bond in question was not intended for the protection of third persons would be to say that its second clause is meaningless and for all practical uses should be stricken from the instrument. One of the canons of construction is that, if possible, effect must be given to all parts of the instrument. On defendant's theory, what effect could be given the obligation 'to deliver the work' . . . '*free from all debts or liens of every character* on account of materials furnished or labor performed?' This being a public building no debts made by the contractor could become a lien or charge on the building or impose any liability on the Board. So far as the protection of the building and of the Board was concerned those words were superfluous, but they were pregnant with meaning if their purpose was to benefit third persons. Manifestly it was the intention of the parties to insert a condition similar to that required by the statute, to compel the contractor to pay for material and labor that entered into the construction."

The reasons we gave for holding the sureties liable in that case are sufficient to exonerate the surety from liability in the case in hand. This being a contract for the construction of a private building which was entered into with reference to the protection the lien

statutes would afford mechanics and materialmen, the absence from the bond of an express provision given such persons a right to sue thereon, clearly evidenced the intention of the contracting parties that the bond should be for the sole benefit of the obligee.

In answer to the final argument of plaintiffs that they should be allowed to recover under the equitable doctrine of subrogation, it suffices to say that to accede to that view would be to declare that the expressed intention of the parties to the contract to exclude plaintiffs and their kind as beneficiaries must be swept aside and substituted by a court-made contract of opposite purpose. The doctrine of subrogation never has been, and should not be, applied to interfere with the right of persons to make their own contracts and have them enforced as made.

The judgment is affirmed. All concur.

**ALICE C. MULLERY, Respondent, v. MISSOURI
& KANSAS TELEPHONE COMPANY, Appel-
lant.**

Kansas City Court of Appeals, May 24, 1915.

1. **NEGLIGENCE: Master and Servant: Safe Place to Work: Rest Room for Servants.** Where a master provided a rest room in which the telephone operators were required to go at stated periods during the day and rest as part of their duties, an operator, who, when the rest period arrived, had left the board and gone to the rest room as required was still in her line of duties and was required to be in the regular performance of her work. In such case the duty rested upon the defendant master to see that the rest room was maintained in a reasonably safe condition.
2. ———: ———: ———: ———. The master cannot delegate to an independent contractor the duty to use reasonable care to furnish his servants with a reasonably safe place in which to work. Where one is charged with a duty arising

Mullery v. Missouri & Kansas Telephone Co.

from a legal obligation which he cannot devolve upon another, the rule as to independent contract does not apply.

3. **PLEADING AND PROOF: Acts of Négligence.** Where a plaintiff pleads and proves two or more negligent acts and proves that his injury must have been the direct result of one or all of them he is not required to go further and distinguish by proof the particular one that caused his injury. To satisfy his burden, it is enough for him to show that his injury resulted from a specified wrongful act of defendant.

Appeal from Buchanan Circuit Court.—*Hon. Chas. H. Mayer, Judge.*

AFFIRMED.

D. E. Palmer, W. B. Morris and Broaddus & Crow for appellants.

Mytton & Parkinson for respondent.

JOHNSON, J.—Plaintiff sustained personal injuries while in the service of defendant as a telephone operator, and sued to recover damages on the ground that her injuries were caused by negligence of defendant in failing to exercise reasonable care to furnish her a reasonably safe place in which to work. Defendant maintained a rest room in its building for the use of female employees and the operators of the switchboard, of which plaintiff was one, were required to retire to this room at fixed periods during the day for rest and relaxation. There were two rows of metal lockers in the room on a balcony which extended along the north wall at a height of six feet above the floor. One row stood against the north wall, the other across a narrow aisle with the backs of its lockers facing the room. The lockers were for the use of the employees and the aisle between the rows was reached by steps leading from the floor of the room to the west end of the balcony. There was a space of three or four feet between the east end of the balcony and the east wall. The door

to the room was opposite this end and in entering or leaving the room a person would pass under the balcony at its southeast corner. Plaintiff had entered the room during a rest period and was standing by a table some distance out from underneath the balcony when a section, consisting of three lockers, fell into the room from the outside row and struck her on the head and left shoulder, inflicting the injuries of which she complains. Alterations in the interior of the building had been in progress for some time and among the changes contemplated by defendant was the removal of the balcony from the rest room. The alterations were being made by a contractor under an independent contract with defendant which required the removal of the balcony but did not mention the preliminary task of removing the lockers. Defendant's superintendent contended that it was the duty of the contractor to perform that task and the latter seems to have acquiesced in that construction of the contract. In any event one of his foremen and a helper proceeded to the balcony a short time before the injury and started to remove the clothing of the employees from the lockers and to take off the doors which swung on pin hinges and were easily removed. The helper was carrying an armful of clothing from the lockers into the room and the foreman had slipped one door off the hinges when the section of three lockers at which they were working toppled over and fell into the room. The lockers had been constructed with feet provided with holes for attachment to the floor with screws but when they were put into place a year or more before the date of the injury the rear feet had been taken off and the front feet had not been screwed to the floor. The top of the row leaned against and was kept in place by, the beveled edge of a ceiling beam. After the fall of the section there were marks on the floor made by the scraping of the front feet which indicated that the lower end of the section had slipped towards the aisle until

the top had receded below the line of the beam, thus leaving the section without necessary support.

The gravamen of the charge of negligence in the petition was the failure of defendant to maintain the rest room in a reasonably safe condition for the use of plaintiff, its servant, but the petition went further and specified a particular act of negligence as the cause of the action upon which a right to recover damages was predicated, viz., the negligent construction and maintenance of the outer row of lockers without attachment to the floor of the balcony or the top support to prevent the legs from slipping forward.

The defense was a general denial and pleas of assumed risk and contributory negligence and the non-liability of defendant on the ground that the negligence, if any, which caused the injury, was the negligence of an independent contractor. A trial of these issues resulted in a verdict for plaintiff in the sum of \$10,000, which was reduced by remittitur to \$5000, and judgment was entered for the latter sum. Defendant appealed and we reversed the judgment and remanded the cause on the ground that the evidence of plaintiff failed to show that the specific act of negligence alleged in the petition was the cause of her injury. [See 180 Mo. App. 128.] We said in the opinion: "The inference to be drawn from the evidence is that so long as the lockers remained as installed, they were safe, but, on account of the method of their construction, the work of taking them down rendered it obviously necessary to observe precautions to prevent them falling during the progress of their removal. On account of the way they were constructed any attempt to remove them without steps being taken to prevent their fall was negligence and thereby the room was rendered dangerous and unsafe. The method of construction no doubt was the remote cause of the fall, but the proximate cause was the effort to remove the locker standing in that situation without taking any precautions what-

ever to prevent its falling. At least such is the reasonable, natural and, therefore, only permissible inference to be drawn from the evidence. Even if the evidence be considered such that the locker may have fallen either from a negligent original construction or by reason of the preparations to remove it, still, if the evidence leaves it uncertain which of the two causes produced the fall, and the petition has specified only one of such possible causes, then there is a failure of proof, because it is incumbent upon plaintiff to make out her case not only by showing the particular act of negligence specified but also that the one specified was the direct and proximate cause of the injury. The evidence must be such as will reasonably show, or at least will support a reasonable inference, that the act pleaded was the proximate cause. This cannot be left to conjecture or arbitrary choice." The case was remanded to give plaintiff an opportunity to amend her petition "in such manner as to support and come within the evidence." We did not hold there was no evidence of negligent construction as alleged but that the proof did not tend to show a direct causal relation between such negligence and the injury, and did tend to show that the direct cause was negligence in proceeding with the work of removing the lockers without taking into account and properly guarding against the dangers that might arise in the prosecution of the work from the negligent way in which the lockers had been emplaced.

After the cause was returned to the circuit court plaintiff amended her petition by adding another specification of negligence, i. e., that "defendant carelessly and negligently caused and permitted said lockers so carelessly and negligently maintained to be worked upon, in and about preparatory to removing the same, and that the removal of the same from the balcony and the work and acts done preparatory to and in preparation for the removal of the same from the

balcony rendered the rest room dangerous and unsafe for the use of the employees, that the defendant carelessly and negligently failed to take any precautions for the safety of its employees using said rest room while said lockers were being worked in, about and upon preparatory to removing same."

As thus amended the petition specified two particular acts of negligence from which, singly or together, the injury directly resulted, i. e., negligent construction and negligence in not taking proper preventive steps, under all the circumstances of the situation, to maintain the place where plaintiff was required to be, in a reasonably safe condition.

The answer presented the same defenses as before and a re-trial of the cause on substantially the same evidence we considered on the former appeal resulted in a verdict and judgment for plaintiff in the sum of \$6000, and defendant again appealed. The principal contention of defendant is that the evidence of plaintiff fails to present a case for the jury and that the demurrer should have been given.

There is no evidence in the record from which a reasonable inference could arise that plaintiff was guilty of contributory negligence or that she assumed the risk which culminated in her injury. It was her duty, prescribed by defendant, her employer, to return to the rest room and remain there during that rest period. She had no knowledge, nor had she been in position to know, of the manner in which the lockers had been placed in position and were being supported, nor did she know that workmen had started to remove them. She had no reason to anticipate any danger or that her employer had been or would be remiss in the performance of its duty to exercise reasonable care to maintain this place for rest and relaxation in a reasonably safe condition. How she could have been guilty of any negligence in occupying the room in the usual manner and in assuming that it was a safe place,

has not been, and could not be, made apparent. On the hypothesis that the fall of the lockers was due to one or both of the pleaded acts of negligence the risk created by such negligence was not assumed by her, since it is too well settled in the jurisprudence of this State to require the citation of authorities that a servant does not and cannot assume risks of injury caused by his master's negligence.

And we repeat what we said in the former opinion that whether or not the work of preparing to remove the lockers was being done by an independent contractor is immaterial, since the duty of defendant to exercise reasonable care to provide a reasonably safe rest room for the use of plaintiff was an absolute duty which could not be delegated to another in a manner to relieve defendant from responsibility for its proper performance and liability for its negligent non-performance. [Morton v. Dry Goods Company, 126 Mo. App. 377; Long v. Moon, 107 Mo. 334; Herdler v. Stove Co., 136 Mo. l. c. 16.] The case on the demurrer to the evidence is reduced to this question: Does the evidence of plaintiff tend to show that a pleaded act of negligence was the proximate cause of her injury?

That the fall of the lockers was due to negligence of defendant is well established by proof. The evidence is circumstantial but the inference of negligence has a complete and perfect evidentiary foundation and does not depend in any degree upon the rule of *res ipsa loquitur*, or any other presumption. As a rule that presumption cannot be invoked in a master and servant case (Hamilton v. Railway, 123 Mo. App. 619) though there are cases where it will arise. [Klebe v. Distilling Co., 207 Mo. 480.] It cannot be applied in cases where particular acts of negligence are pleaded. [Mullery v. Tel. Co., *supra*, l. c. 135, and cases cited.] As stated, plaintiff's case does not rest in part upon a presumption of negligence based upon the mere fact that the lockers fell and would not have fallen if they had been

properly maintained, but upon facts and circumstances which, if true, show that they were negligently installed and maintained in being placed on the outer edge of the balcony without any attachment, and that, without taking any steps to keep them from becoming displaced and falling, defendant set men to work upon them thereby rendering them unstable and causing them to fall.

It is noted in *Hamilton v. Railway*, supra, l. c. 623, that there are master and servant cases where the occurrence in question is of such a nature as to bespeak an origin in the master's negligence without the aid of a presumption, and in such cases proof of the occurrence is held to be sufficient prima-facie evidence of negligence. "The occurrence shown may be of that nature which could not in any degree of probability have happened without a negligent cause. Its proof is tantamount to the direct and affirmative proof of negligence." The existence of negligence may be shown by circumstantial evidence and where the circumstances disclosed afford direct support for an inference of negligence without resort to presumptions a prima-facie case is made out. In the present case the evidence clearly and explicitly points to the physical causes of the fall of the lockers and on the issue of negligence leaves nothing to conjecture or presumption. The rule of *res ipsa loquitur* is not in the case.

But defendant endeavors to utilize our former decision in a way to defeat plaintiff in detail. It treats the issue of negligence tendered in the original petition as having been finally settled against the plaintiff and, therefore, as *res adjudicata*, and, regarding the new issue raised in the amended petition as the only issue of negligence remaining in the case, attacks the sufficiency of the evidence to support it. Defendant's position is found to be inconsistent, in view of our finding in the former decision from exactly the same evidence we now have before us, that "not only does

the evidence fail to show that negligent construction was the proximate cause of the injury but the inference is that the proximate cause was the attempt to remove them." If our decision conclusively settled the issue that negligence in the installation and maintenance of the lockers was not the proximate cause, it just as conclusively settled the question of the sufficiency of the facts and circumstances in proof to raise an inference that negligence in the attempt to remove the lockers was such cause, and defendant should not be allowed to escape liability on the theory that the decision closed all questions decided in its favor but left open those decided against it.

We think defendant misinterprets the scope of the former decision. We did not exclude the issue of negligence in the maintenance of the lockers from the case but merely held that the proof was insufficient to show with requisite definiteness that such negligence was the proximate cause of the injury. We found that the most one could say in favor of plaintiff's evidentiary situation was that she had shown that the fall of the lockers was due to one of two negligent causes, only one of which was alleged in the petition, and we rightly concluded that "if the evidence leaves it uncertain which of the two causes produced the fall and the petition has specified only one of such possible causes, then there is a failure of proof because it is incumbent upon plaintiff to make out her case, not only by showing the particular act of negligence specified, but also that the one specified was the direct and proximate cause of the injury." If the petition, then, as it does now, had specified the two acts of negligence as having caused the injury, either singly or conjointly, we would have held as we now hold, that proof of the existence of both acts, with proof that one or the other must have been the proximate cause, was sufficient to take both to the jury to determine which of the two was such cause. Where a plaintiff pleads

and proves two or more negligent acts and proves that his injury must have been the direct result of one or of all of them, he is not required to go further and distinguish by proof the particular one that caused his injury. To satisfy his burden, it is enough for him to show that his injury directly resulted from a specified wrongful act of defendant.

The scope of the action as presented in the amended petition properly embraced the two pleaded acts of negligence and since the evidence of plaintiff, even in defendant's view of it, tends to show that one of the two acts was the proximate cause, plaintiff discharged her burden of proof, and the court did not err in overruling the demurrer to the evidence. In what has been said we have answered the objections to the instructions given at the request of plaintiff. There was no prejudicial error committed at the trial.

But we agree with defendant that the verdict was excessive. Plaintiff is twenty-three years old, was in good health at the time of her injury and is in good health now, except for an occasional headache followed by a nervous chill. She was struck on the head and shoulder and was unconscious a few moments. No bones were broken and no serious or lasting injury was inflicted to her head. The most serious injury she sustained was a nervous shock which developed into a mild form of neurosis from which her own expert witnesses say she will have a complete recovery, though she had not fully recovered at the time of the last trial. She was confined to her bed two or three weeks after the injury and occasionally thereafter was ill in bed from attacks of headache and nervous chills, but she has been employed as clerk in different business places a large part of the time since her injury and has been quite active in her social life. To all outward appearances she is normal, healthy and endowed with rather more than ordinary youthful spirits and zest. Apparently she is popular socially for the evidence

shows that night after night she attended theaters, parties, dances, club meetings and other social functions and participated in the activities of such gatherings. We fully appreciate the gravity and obstinacy of nervous diseases but considering the facts that her neurosis, if it exists, is described by her physician as slight, that it is of traumatic origin and temporary, and that it has caused so little interruption of her normal activities, we think a verdict of \$6000 is clearly beyond the bounds of reason and that \$4000 would be the maximum limit of a reasonable assessment of damages. On condition that within ten days from the filing of this opinion a remittitur of \$2000 and accrued interest thereon be filed by plaintiff, the judgment will be affirmed; otherwise it will be reversed and the cause remanded. It is so ordered.

All concur.

MERRILL E. BULSON, an Infant, by ISAAC F. BULSON, Next Friend, Respondent, v. INTERNATIONAL SHOE COMPANY, a Corporation, Appellant.

Kansas City Court of Appeals, May 24, 1915.

1. **NEGLIGENCE: Personal Injuries: Leveler Machine.** The plaintiff, a minor, was operating a leveler machine in the defendant's shoe factory and sues to recover damages for injury to one of his thumbs. The machine which he was operating had two treadles, and while he was endeavoring to pull a shoe from the last, he lost his balance, inadvertently stepped on the wrong treadle, and the thumb of his left hand was caught and mashed. *Held*, that the demurrer to the evidence was properly overruled.
2. ———: **Master and Servant: Minor.** The master is liable for failure to instruct a minor unless both the danger and the means of avoiding it are apparent and within the comprehension of the servant. And where the servant is a minor, the master must

put his warnings in such language as to be sure that the servant understands and appreciates the danger. It is not enough that he should do his best to make the servant understand, he must actually understand and appreciate the danger.

3. **INSTRUCTIONS: Proximate Cause.** It is error to submit, in an instruction, a question, raised in the petition, of negligence in failing to instruct plaintiff in the use of the brake, and of whether or not such negligence was the approximate cause of the injury, when the plaintiff's own evidence demonstrates beyond question that the absence of instructions relating to the use of the brake or clutch could not have been a proximate cause.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*
Judge.

REVERSED AND REMANDED.

Irwin & Peters and *George B. Logan* for appellant.

A. T. Dumm and *D. F. Calfee* for respondent.

JOHNSON, J.—Plaintiff, a minor eighteen years of age, was injured while operating a machine in defendant's shoe factory at Jefferson City, and sued for the recovery of his resulting damages on the ground that his injury was caused by negligence of defendant. The answer contained a general denial and pleas of assumed risk and contributory negligence. The verdict was for plaintiff in the sum of \$1000, and following the overruling of its motions for a new trial and in arrest of judgment, defendant appealed.

The machine, called a leveler, at which plaintiff was working at the time of his injury, was operated by steam power and was used to level and give proper form to shoe soles after attachment to their uppers. It was ponderous and complicated in structure but its operation was comparatively simple, did not require special skill or long experience, and was attended by

no other probable danger to the operator than that of having his hand caught and mashed between the form and last when they moved into close contact to level and shape the intervening sole by the exertion of powerful pressure. Standing in front of the machine—his proper position—the operator faced two pairs of forms and lasts, one for treatment of right, the other of left shoes, with a space of nine or ten inches between them. Each last was in the form of a sole and was attached, bottom upward and on a horizontal plane, to the end of an upright leg. The form above it was also in the shape of a sole but larger and, when the machine was at rest, faced the operator on a vertical plane. The arm to which it was affixed, as well as the leg of the last, was movable and when a shoe was placed on the last and the power applied to the machine, the form and last moved together along the line of an arc eighteen or twenty inches in length. The first contact was at the heel, but the two surfaces came into complete but progressive contact with a rolling, rocking motion. The pairs were moved alternately by the operator who applied the power by pressing his foot on the treadle for the pair he wished to set in motion and when one pair was in operation the other automatically stopped. The two treadles were two or three inches from the floor and were two inches apart. The lasts were detachable from the legs and it was necessary that the size of the lasts should correspond to the size of the shoes being treated. Between the two legs, but a foot or more below the surface of the upturned lasts, was the handle of a clutch, or brake, by which the operator could stop the machine instantly by throwing the belt to an idle wheel. In the usual method of operation a shoe was fitted over the right last, the treadle was pressed with the foot, and on the return of the last the shoe was removed. In the meantime a shoe was put on the left last and as the right shoe was removed the left treadle was pressed, and so on. The

shoe was intended to fit loosely over the last to be easily removed, and, in the proper manipulation of the shoes, during the entire operation, it was not necessary for the operator's hands to be placed in a position of danger.

Plaintiff, whom the evidence depicts as a person of average intelligence, capacity and judgment for one of his age, had been working on the machine only two days and had had no other experience. At the time of his injury he was working upon a case of number 5 unlined shoes and using number 5 lasts. He states, and there is substantial evidence to support his statement, that sometimes shoes of the small sizes fitted tightly on the lasts and were removed with difficulty, and that the shoe on the right last—the removal of which occasioned the injury—fitted so tightly that in his attempt to remove it he lost his balance to such an extent that instead of pressing on the left treadle to apply the power to its corresponding last and form, he inadvertently stepped on the right treadle, with the result that the right shoe which he was attempting to remove was moved into contact with the form and the thumb of his left hand was caught and mashed, necessitating its amputation.

The specifications of negligence in the petition which is voluminous may be reduced to these four specific acts: First, a negligent failure to give plaintiff, who was known to be a minor and inexperienced, proper instructions to enable him to run the machine with reasonable safety to himself. Second, giving him improper and dangerous directions relating to the operation of the treadles. Third, failing to warn him of the risks and dangers of the work. Fourth, negligently furnishing him shoes of irregular size which purported to be, and should have been, of uniform size, and thereby adding an unnecessary risk to the normal hazards of the operation.

The evidence of plaintiff relating to the first and third charges tends to show that the foreman gave him most meager and inadequate instructions and only a general warning that if he allowed his hand to be caught between the form and last it would be mashed, a fact which, as plaintiff remarked, "anybody can see." The machine was in operation when plaintiff was employed and the foreman took him to the machine, told him to watch and carefully note its operations, left him for an hour and returning asked him, "Do you think you can run it now?" Plaintiff replied, "I believe I can," and was directed to go to work. While he was watching the machine, the operator showed him how to take the shoes off and put them on, how to select the proper lasts and how to work the treadles, but did not show him the brake and its uses, nor inform him of the risk of tight-fitting shoes and how to avoid it. Sometime after he began to work a tight shoe gave him trouble on the right last and he was compelled to let go of the shoe which was in motion, with the result that it was subjected to a second pressure and was damaged. The foreman brought this shoe back to plaintiff and warned him that shoes thus damaged would be charged to him, but did not tell him how to avoid the risk of removing tight shoes.

Afterward the foreman noticed that plaintiff in working the treadles used his right foot for the right treadle and his left foot for the left (a method which plaintiff's evidence strongly tends to show was the only proper and reasonably safe one), but the foreman told him that was too slow and ordered him to use his right foot for both treadles. Plaintiff obeyed the order and was attempting to press the left treadle with his right foot on the occasion in question, with the result that, in combination with his effort to pull the tight shoe off the last, it affected his equilibrium and caused his foot to slip over to and press down upon the right treadle.

As to the fourth charge of negligence the evidence of defendant is that since the shoes were entirely machine made, it was impossible for any variations to occur in sizes made from the same last and that there was no such occurrence in the operation of the machine as a tight-fitting shoe, but the evidence of plaintiff to the contrary is substantial and, for present purposes, we must accept it as conclusive.

Counsel for defendant earnestly contend that the court erred in not sustaining the demurrer to the evidence and on this branch of the case the initial question of importance is the nature of the duty defendant owed to plaintiff for his protection and security in the operation of a machine which, though its proper operation called for no great skill or preparation, was an instrumentality for the application of great power and if not properly handled by the operator, would be highly dangerous to him.

The well-known general duty of a master to exercise reasonable care to furnish his servant a reasonably safe place in which to work, and with reasonably safe tools and appliances, embraces the particular duty where an inexperienced servant is employed upon dangerous work, to give the servant such instructions in the proper method of doing the work and such warning of natural dangers and of dangers which will attend a departure from the proper method as is reasonably required by the servant's inexperience and lack of proper knowledge and which will enable the servant, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself. [26 Cyc. 1176, 1177.]

This duty the master owes to an inexperienced adult possessed of the judgment and care presumed in the average adult, but with respect to a minor, the duty must take into account the further fact of minority, with its usual concomitants of immature judgment and care, and the master must give such instructions

and warnings as are reasonably required to obviate the risks born of such immaturity. [26 Cyc. 1080; 3 Labatt, Master & Servant, 1154, 1155.]

It is said by the latter author: "The rule actually applied by the courts is merely this: The master is liable for the failure to instruct a minor unless both the danger and the means of avoiding it are apparent and within the comprehension of the servant." And the former author says (p. 1176) "where the servant is a minor, the master must put his warning in such plain language as to be sure that the servant understands and appreciates the danger. It is not enough that he should do his best to make the servant understand—he must actually understand and appreciate the danger." The cases in this State recognize these rules. [Vanesler v. Cigar Co., 108 Mo. App. 621; Saller v. Shoe Co., 130 Mo. App. 712; Dowling v. Allen, 74 Mo. 13; Deeds v. Railroad, 157 Mo. App. 463; Warnke v. Rope Co., 171 S. W. 643, 186 Mo. App. 30.] And the further rule that a minor is not guilty of contributory negligence if he exercise the degree of care reasonably to be expected of a person of his age, experience and capacity. [Burger v. Railroad, 112 Mo. 238; Jackson v. Butler, 249 Mo. 342; Henderson v. Kansas City, 177 Mo. 477.]

No inference may be indulged as a matter of law that a boy eighteen or nineteen years of age and shown by the evidence to be of ordinary intelligence and capacity for one of his years should be held to the full accountability of an adult. [Dowling v. Allen, *supra*.] Cases cited by defendant where the instructions and warnings given by the master have been held sufficient in law, or where the minor servant has been pronounced guilty in law of contributory negligence deal with instances where the risk indisputably was of a nature to be within the knowledge and appreciation of a person of the age and capacity of the plaintiff or where his act which contributed to the injury was clearly beyond

the pale of the degree of care to be expected of a person in his situation and of his age and apparent capacity. [Nugent v. Milling Co., 131 Mo. 241; Smith v. Box Co., 193 Mo. 715; Herdt v. Koenig, 137 Mo. App. 589; Hirsch v. Bread Co., 150 Mo. App. 171; Stegman v. Gerber, 146 Mo. App. 104; Battles v. Railway, 178 Mo. App. 596.] Applying these rules to the facts of the present case we conclude that although it appears the lack of particular instructions and warnings, and the giving of improper instructions relating to the use of treadles, of which plaintiff complains, were matters of which an inexperienced adult in his situation would have had an equal right to complain, the fact of plaintiff's minority was an element of the duty defendant owed plaintiff and it was for the jury to decide to what extent that element should have been recognized in defendant's instructions and warnings, and certainly it was for the jury to consider this element in the solution of the issues of contributory negligence to which we shall hereafter refer.

The evidence of plaintiff clearly establishes negligence of defendant in not giving him necessary instructions in the proper method of operating the machine, in giving him improper directions about using the treadles, and in not warning him of the dangers of an improper operation of the machine. The jury were entitled to infer that defendant was negligent in not telling him how to meet the situation created by a shoe fitting the last too closely, of the likelihood and danger of inadvertently pressing the wrong treadle and of the danger of losing his proper balance if he used only the right foot and stood, as he did, directly in front of the right treadle, instead of standing in front of the space between the two. Plaintiff had no knowledge of these important things and his attempt to press the left treadle from an improper position, coupled with his effort to remove the shoe from the right last, is

shown by his evidence to have been the proximate cause of his injury.

We cannot say, as a matter of law, that he was guilty of contributory negligence. While the machine did not move rapidly and he had ample time to remove his hand, it was natural for him to be surprised and disconcerted by the unexpected slip of his foot and not to realize what was happening before his hand was caught. Nor was he negligent in law for standing before the right treadle in view of his lack of proper instruction and of knowledge of the greater risk of such position, nor of continuing the operation of the machine in view of the fact that by pressing the left treadle the right form and last thereby would be stopped and prevented from coming together. His conduct was an issue of fact for the jury to determine and was correctly submitted in the instructions. The demurrer to the evidence was properly overruled.

We have examined the rulings on the admission of evidence criticised by defendant and find the objections not well taken. And the instructions are found to be free from prejudicial error, except in one important respect. Plaintiff's fourth instruction should not have been given. It submitted to the jury the question, raised in the petition, of negligence in failing to instruct plaintiff in the use of the brake and of whether or not such negligence was the proximate cause of the injury.

Plaintiff's own account of his injury demonstrates beyond question that the absence of instructions relating to the use of the brake, or clutch, could not have been a proximate cause. If he had an opportunity of stopping the machine by moving the brake, thereby preventing the coming together of the last and form, he had a better opportunity of doing the quicker thing—of moving his thumb out of the way. If, knowing the parts were meeting, he voluntarily kept his thumb in a place where it would be mashed, he was guilty of negligence. His position on the issue of contribu-

Fellhauer v. Quincy, Omaha & Kansas City Railroad Co.

tory negligence is and must be that he was deprived of a reasonable opportunity to avoid the injury by the sudden and unexpected movement of the right pair and on this hypothesis, which is the only one that will permit him to recover, he had no chance, either to withdraw his hand from the shoe, or to do the additional act of seizing the brake handle with the same hand. For the error of submitting these false issues of negligence and proximate cause, the judgment is reversed and the cause remanded.

All concur.

ELIZA FELLHAUER, Administratrix, Respondent,
v. QUINCY, OMAHA & KANSAS CITY RAIL-
ROAD COMPANY, Appellant.

Kansas City Court of Appeals, May 24, 1915.

1. **NEGLIGENCE: Master and Servant: Scope of Employment.** A shipper told the station agent the freight car he was to use in shipping his household goods was not in a convenient place. The agent said to see the engine hostler and get him to place the car where he desired. The hostler told his helper to take a freight engine standing in the yard and "spot" the car. He did so first in front of the shipper's house and afterward on a storage track in front of the shipper's shop. This track was never used for loading cars. After the hostler's helper had spotted the car on the storage track and the shipper began loading his goods, the hostler helper uncoupled the engine and went about his regular duties coaling and caring for the engine. He then stored it, as was his duty, on the track, and in doing so struck the car and injured the shipper who was loading his goods. *Held*, that even if the spotting of the car was outside the scope of the hostler helper's duties and in violation of his master's orders, yet when he did the injury he was clearly acting for his master and in the line of his duty, and knowing or having reason to believe the shipper was in the car he had no right to negligently injure him, and if he did so his master was liable.

2. ———: ———: ———: Contributory Negligence. Since it was not conclusively shown that the shipper knew it was in violation of the master's rules to place the car where it was, and since the shipper knew the servant was aware of his presence in the car, he had a right to assume that the servant would not negligently strike the car with his engine and injure him. Hence the shipper was not guilty of contributory negligence in not keeping a watch outside the car for the engine or in attempting to load the car at that point.

Appeal from Grundy Circuit Court.—*Hon. G. W. Wanamaker, Judge.*

AFFIRMED.

J. G. Trimble, Hall & Hall for appellant.

O. G. Williams and Hubbell Bros. for respondent.

TRIMBLE, J.—Originally, this was a suit by Ferdinand Fellhauer for damages claimed to have been received as the result of the alleged negligent striking and consequent sudden movement of a box car in which he was arranging articles of personal property for shipment over defendant's road. He claimed he was standing on a box in the car when it was suddenly and without warning struck and moved a short distance by a local engine whereby he was thrown to the floor and severely injured. Before his case came to trial, Fellhauer died suddenly of apoplexy; and the cause was revived in the name of his administratrix, it being alleged in the amended petition that the injuries he is said to have received did not cause his death. A trial was had upon said amended petition and a verdict was rendered in plaintiff's favor. Thereupon defendant appealed.

The alleged injury occurred at the defendant's station in the town of Osborn, Missouri, where Fellhauer and his son Frank lived and conducted a blacksmith shop. They desired to move to the town of

Coffey, also on defendant's line, and applied for a freight car in which to ship their household goods and blacksmith tools. The agent told them he would have a car there for them in a few days.

The station at Osborn is one used jointly by the defendant and the Chicago, Burlington & Quincy railroad. These two lines are parallel and run east and west at this point. The Burlington runs south of the depot and the defendant's railroad runs north of it. The house or team track, on which cars stood when loaded or unloaded, was a track which left the main line of the Burlington at a switch east of the depot, curved to the north as it went west until it connected with the main line of the defendant at a point just north of the depot, and then, passing the depot, it curved south again and joined the Burlington at a switch west of the depot. Defendant had two sidetracks north of its main line known as storage tracks number one and number two, the latter lying north of the former. They connected with defendant's main line at a switch east of the depot and, after running parallel with the main line past the depot, again joined the main line at a switch some distance west of the depot. A short stub, known as the coal track, left storage track number one near the east end thereof and ran west for a short distance and stopped between the main track and said storage track number one. The Fellhauers' residence was a short distance north and a little west of the west switch where the two storage tracks merged into one and joined the main line west of the depot. Their blacksmith shop was a short distance north and slightly west of the point where the sidetrack left the main line at the switch east of the depot and divided into said storage tracks number one and number two.

When the car intended for the Fellhauers' use came, it was placed on the house track a short distance west of the depot. At this place it was between the

main lines of the two railroads. It seems that the dray team the Fellhauers were going to use was wild and afraid of trains, and when the location of the car was ascertained, Frank Fellhauer went to Deems, the station agent, and told him he couldn't get to the car where it was setting. Deems told him to get Booth, the engine hostler, to set the car where it would be convenient. (Osborn was a division point, and freight engines were tied up there and placed in the hostler's care whose duty it was to clean them, keep them properly coaled, and with fire up, ready to go out whenever the train crew came to take out a train.) Thereupon, Frank Fellhauer went to Booth, the hostler, and he said he would have his helper, Roy Kirchner, who was a boy about sixteen or seventeen years of age, to do it. Frank Fellhauer went to look for Kirchner and finally Kirchner came in and said Booth had already told him to spot the car wherever the Fellhauers needed it.

Kirchner took the freight engine tied up at that station and moved the car to a point on the main line just west of the west switch and opposite the Fellhauers' residence. And here the Fellhauers carried their household goods down and put them into the car without the use of the dray. After the household goods were loaded, Kirchner then moved the car to a point on, and near the east end of, storage track number two, opposite the blacksmith shop. Then the tools and blacksmith outfit were hauled by the dray from the shop and loaded into the car. After setting the car at this spot, Kirchner uncoupled the engine and took it over on storage track number one where he supplied it with coal and then ran it back on to track number two the proper storage place for it when it was cleaned and coaled ready for the crew to take it out on the road. In order for him to get the engine far enough on track two to allow cars to pass onto track one, it was necessary to place the Fellhauer car further west and the boy pushed it back with the engine. In doing so,

he struck the car hard enough to move it twenty-five or thirty feet slightly up grade notwithstanding it was "choked" at both ends by pieces of railroad ties placed under the wheels. Ferdinand Fellhauer as stated, was in the car and was thrown down and injured by the impact of the engine against the car.

It is very earnestly and strenuously contended that plaintiff is not entitled to recover and that the instructions in the nature of demurrers to the evidence should have been given. Defendant's view is that the train crews were the only employees whose duty it was to "spot" cars, that is, to place them at any particular place for loading or unloading; that tracks one and two were used only as storage tracks where cars were set by the train crews to be taken out whenever the proper train left; that cars were never loaded or unloaded on these tracks but, when placed there, they were ready to go out whether loaded or empty; that no one but the train crews had any authority to do any switching or moving of cars from place to place at the station, and that neither the hostler nor his assistant called the hostler helper, had authority to switch cars, but their duties were solely to care for, clean and coal the engines tied up there and, when in proper trim and ready to go out, to store the engines on said storage track two; that Deems, the agent, had no power to authorize the spotting of cars anywhere except on the house or team track, and that the Fellhauers, in getting the car spotted on the main line in front of their residence and afterwards on storage track two in front of the blacksmith shop, were having Kirchner, the boy, to do something outside of the scope of his duties and in violation of the master's rules; and that as the alleged injury occurred as a result thereof, there was no liability on the part of the master.

It is by no means certain that there is not sufficient evidence from which the jury could find that the

hostler helper was acting within the scope of his duties in spotting the car in front of the residence and afterwards in front of the shop. The agent testified that it was usual and customary for the railroad company to spot a car and set it at a place where the shipper could conveniently load it. Of course this doubtless should be interpreted to mean that the car would be put at any convenient place on the house track, the one set apart for that purpose, and not at any point about the station yards or on the main line outside. But the agent said it was his duty to see that the car was set at some proper place for it to be loaded; and Frank Fellhauer said the agent told him to get Booth, the hostler, to put the car where it would be convenient and that he saw Booth and he said he would have Kirchner, the hostler helper, to do it. Booth does not deny this. Kirchner afterwards told Fellhauer, Booth had directed him to spot the car wherever they needed it, and testified that he used the engine and moved the car at Booth's request. There was evidence that Booth was foreman over the engines tied up at that station and boss over the men who helped him; that ordinarily if there were cars to be coupled, or cars to be spotted, Booth would do it if he was there or he would leave orders to the men who helped him to spot them, and that Kirchner had piloted the engine a number of times and "handled it quite a bit." So that, taking the evidence in its most favorable light for the plaintiff, as we must do in view of the verdict, it shows that Deems had authority to have cars spotted, that he authorized Booth to spot the car where convenient for the Fellhauers, and that Booth had his helper to do it. The most that can be said in defendant's behalf concerning this view of the testimony is that the defendant's servants, in spotting the car, put it at a place other than on the track used for that purpose. But does this fact put the act outside the scope of their employment in the sense the law uses that phrase in

Fellhauer v. Quincy, Omaha & Kansas City Railroad Co.

fixing the liability of a master? If spotting a car was one of the duties of the servant, then the fact that he spotted it at a place other than where they were ordinarily spotted would not relieve the master of liability. [20 Am. & Eng. Ency. of Law (2 Ed.), pp. 163, 164, 167, 170.] If the spotting of cars was one of the duties intrusted to a servant, then his master is not relieved of liability merely because the servant spotted the car at a different place from that ordinarily provided for that purpose. [*Compher v. Telephone Co.*, 127 Mo. App. 553, l. c. 557; *Shamp v. Lambert*, 142 Mo. App. 567, l. c. 575; *Garretzen v. Duenckel*, 50 Mo. 104.] Whether the particular act of the servant was committed within the scope of his employment is often a difficult question, and is frequently one of fact to be determined by the jury under all the facts and circumstances. It cannot be determined by any fixed rule but is rather to be ascertained from the nature of the act, its purpose and all the facts connected therewith. If the act is necessary to accomplish the object of the employment or is intended for that purpose, then it may be within the scope of the employment, though, in the method of performing the act, the servant may have violated instructions or orders. [26 Cyc. 1531, 1533-4-5; *Chandler v. Gloyd*, 217 Mo. 394, l. c. 412; *Payne v. Mo. Pacific Ry.*, 105 Mo. App. 155; 1 *Sherman & Redf. on Neg.* (6 Ed.), sec. 145.] Defendant, however, says that Fellhauer paid the boy Kirchner \$1 for spotting the car and hence the boy was not acting as the servant of the defendant but was the servant of the Fellhauers in spotting the car and was induced by them to do so in a way violative of the master's orders. Fellhauer says he paid the boy the \$1 for helping to carry some of the household goods to the car. There is some evidence tending to show that Kirchner, the boy, knew it was not proper to place the car on the main line or to use the engine in moving the car, but none that the Fellhauers knew it. If Kirchner

was acting within the scope of his employment in moving the car, then it cannot be said, as matter of law, that he was conclusively transformed into the agent of the Fellhauers to do a thing in violation of the defendant's orders, or that the Fellhauers knew it was such violation, merely because they paid him the money. The questions whether Kirchner was acting within the scope of his employment as a servant of defendant, or whether he was acting as an agent for the Fellhauers in moving the car and whether they knowingly induced him to violate the rules of the company or do something outside of his duties, were submitted to the jury, and their verdict was in plaintiff's favor. Of course, if the act of Kirchner was one outside the scope of his employment, or was done as the agent of the Fellhauers, in violation of the defendant's orders, and that act resulted in the injury, defendant ought not to be held liable. [Snider v. Crawford, 47 Mo. App. 8; Graham v. Brandt Shoe Co., 165 Mo. App. 361, l. c. 369; Adams v. Cost, 62 Md. 264; Wood on Master & Servant, sec. 279; Cousins v. Hannibal & St. Joseph R. Co., 66 Mo. 572.]

But the liability of defendant in this case rests on more than the mere question whether the spotting of the car by Kirchner was within the scope of his employment or whether in doing so he was acting for and in behalf of the Fellhauers. In our opinion, the questions whether Kirchner had authority to spot the car and for whom he was acting is, in a sense, remote and has little to do with the case. Because the injury did not occur in connection with the spotting of the car, nor as a part of Kirchner's work in so doing, even if, in spotting the car, he acted as agent of the Fellhauers and not of the defendant. It is unquestionably true that it was within the scope of his duties as hostler helper to coal the engine and place it on storage track number two. In doing that, he was undoubtedly in the line of his employment and engaged in his master's

business. Now, if it be conceded that he spotted the car as agent of the Fellhauers, nevertheless he had ceased the performance of that work when he placed the car on storage track number two and uncoupled his engine therefrom and left the car setting there. If he had been working for the Fellhauers up to that point, his work was done. Nothing remained to be accomplished by the Fellhauers except to finish loading the car, and then it would be taken, as it afterwards was, by the train to its destination. When, therefor, Kirchner took the engine from the car and went from track two to track one alongside the coal track for the purpose of coaling, he had entered upon what was clearly his duties to the company. And when, after coaling and cleaning the engine, he took it back to track two for the purpose of storing it there for use when needed by the train crew, he was acting exclusively for the company and not for the Fellhauers. When he left the car they were commencing to load the machinery and tools into it. He took the engine to an adjoining track and coaled it. Although he was occupied in this about an hour and a half, yet he knew the Fellhauers were at work loading the car and saw them there about thirty minutes before he took the engine back. He had no reason to think they were not there. He made no examination to see whether they were or not. He could not see whether the door on the north side (next to the shop) was open or not. In order to leave the engine on track two so as not to obstruct the passage of incoming engines or cars on track number one, it was necessary to push the car further west and Kirchner thereupon did so with the engine. In doing so he struck it at least hard enough to move it possibly thirty feet slightly up grade and in spite of the pieces of tie placed under the wheels at end end to chock it. He had no right to assume no one was in the car. The Fellhauers were there a short while before and he had

no reason to believe they were not still there. There was evidence that the engine came back with unusual speed, that no signal nor warning of its approach was given, the car did not couple and no effort made to see whether anyone was in the car at the time. It would seem that this is sufficient to support a verdict that the act causing the injury was done while in the scope of the master's employment and that it was negligence to do it in this manner. Kirchner had left the work of spotting the car, if that was not in his line, and had entered upon his master's work when he struck the car. [Vanneman v. Walker Laundry Co., 166 Mo. App. 685, 1. c. 692; Whimster v. Holmes, 177 Mo. App. 130.]

Fellhauer was engaged in loading the car at a place where it had been placed by the railroad employees. There is no conclusive showing that Fellhauer knew the car was not rightfully upon track number two, but even if it had been placed there by himself with no authority from anyone, yet this would not authorize an employee, who knew it was there and had reason to believe the shipper was in it, to carelessly strike the car and injure the person therein. Fellhauer was rightfully loading or arranging his goods in the car, and if the car was not rightfully in the particular place it should have been for loading, yet this makes no difference since Kirchner knew it was there for that purpose and that the shipper was likely in it. The operator of the engine therefore owed him the duty of exercising ordinary care and was negligent in failing to do so. [23 Am. & Eng. Ency. of Law (2 Ed.), 739; Butler v. Chicago, etc. R. Co., 155 Mo. App. 287; Dooley v. Missouri, etc. R. Co., 110 S. W. 135; 3 Elliott on Railroads, 1265c; 2 Thompson on Neg., sec. 1841.] Suppose Fellhauer himself had, without any authority whatever, moved the car to this spot by means of the pinch bar, the hostler helper, knowing the car was there and that Fellhauer was likely to be in or about it, could not recklessly strike the car and

injure him without creating a liability on the part of the master whose work he was then doing. The negligent act was not done in obedience to anything required of the boy, Kirchner, by the Fellhauers. This fact differentiates the case at bar from Snider v. Crawford, 47 Mo. App. 8, Graham v. Brandt Shoe Co., 165 Mo. App. 361, Adams v. Cost, 62 Mo. 264, and other cases cited by defendant. In them the injury was caused in performing the act plaintiff had induced the employee to do outside of his duties or in violation of them. But such is not the case here.

Nor can it be said as matter of law that, since the car was in a place not set apart by the company for loading, Fellhauer was guilty of contributory negligence in not watching out for the impact of the engine. It is not conclusively shown that he knew the car was there without authority or that he was a trespasser by being in that particular spot. Besides his presence was known to the employee using the engine. Fellhauer knew that his presence was known and he had no reason to anticipate that Kirchner would run the engine against the car when he himself had put the car there and knew it was to be loaded at that particular place. Of course if Fellhauer had, without authority, been in the car at that place and had been injured by an employee who did not know or have any reason to think he was there, then he would have been negligent in not looking out for his own safety, or rather there would have been no negligence shown against the one injuring him. But the car having been placed there by the employee, Fellhauer had a right to assume that that particular employee at least would not negligently or recklessly injure him. If that employee knew he was likely to be there he could not negligently strike the car without rendering his master liable. [Judge v. Pullman Co., 209 Fed. 10.] The court did not err in overruling the demurrers to plaintiff's evidence or in refusing defendant's instructions two and

three since, as we have said, the injury was not occasioned while Kirchner was doing any act for Fellhauers, but while he was in the performance of his duties to the defendant.

During the examination of Dr. Wright who was consulted by the elder Fellhauer concerning his injury, he was asked in what condition he found Mr. Fellhauer with respect to his arms and shoulders. The doctor said Fellhauer came to see him in reference to pain and soreness and inability to use his arm; that he had at that time limited motion and a good deal of soreness in and around the shoulder joint and thickening and stiffness in the wrist joint and a good deal of it, and that the inability to use the wrist showed the effect of injury to the back of his hand and in the muscles and ligaments of the shoulder joint. In the course of the doctor's statement as to these things he remarked that the patient said he couldn't use his arm, that, "as I understood it and remember it he was hanging up something in the car—well, he was standing on a box and was thrown from the box." Then, after he testified as to the soreness and stiffness, thickening, etc., the defendant's counsel moved to strike out of the answer of the witness "those things that Mr. Fellhauer told him" as hearsay. The court thereupon inquired of the witness if the conditions he had testified to were obtained in connection with the examination and when the doctor answered in the affirmative, the motion to strike out was overruled. We do not understand the witness to say that Mr. Fellhauer told him of the past soreness, stiffness, thickening, etc., of his arm and shoulder, but that the witness himself stated such conditions were present and existing at the time of his examinations, which were three in number. The patient's complaint of present pain, soreness, and inability to use the arm at the time of the examinations and in the course thereof, were not objectionable. [McHugh v. St. Louis Transit Co., 190 Mo. 85, l. c.

95; *Holloway v. Kansas City*, 184 Mo. 19, l. c. 38, 39.] It is true the doctor in the course of his testimony said the patient told him he was "hanging up something in the car"—"was standing on a box and was thrown from the box" but Fellhauer's deposition was read to the jury and in it he stated that was what he was doing, and no one contradicts this fact. It was not a contested point in the case. The statement of the doctor as to this was hearsay and could have been properly stricken out, but we are unable to see wherein the evidence was prejudicial. The question asked of the doctor was "in what condition did you find Mr. Fellhauer with respect to his arms and shoulders?" During the course of his answer he made the above statements. They were not in response to the question asked and did not supply any proof that was lacking nor did they refer to anything about which there was any contradictory evidence. It is not seen how they could have any effect whatever on the verdict. They could in no way "materially affect the merits of the action," and if not, then under section 2082, Revised Statutes 1909, we should not reverse and remand the case on this account. If defendant was not injured by it, its admission will not justify a reversal. [*Holmes v. Goldsmith*, 147 U. S. 150.]

The judgment is affirmed. The other judges concur.

In re SAMUEL VANCE KRAUTHOFF; VANCE
SHOUSE MEREDITH, Appellant, v. EDWIN A.
KRAUTHOFF, Appellant.

Kansas City Court of Appeals, May 24, 1915.

1. **DIVORCE: Custody of Children: Jurisdiction.** By reason of the separation and divorce of parents, their child becomes a ward of the court in which the decree of divorce is rendered,

and jurisdiction to award the custody of such child vests in that court to the exclusion of all others. Such jurisdiction is a continuing one, giving the court power to modify its decree as to the custody of the child from time to time, as circumstances change and new conditions arise to make a modification necessary.

2. ———: ———: ———: **Rights of Parents.** The Act of 1913, Laws of Mo. 1913, page 91, in relation to the custody of children did not create a new rule or principle upon which cases involving the custody of children are to be decided, but merely placed the mother upon the same legal level with the father in respect of her eligibility to be selected as the custodian of her child. The right of neither parent is absolute, nor can it become so by contract or agreement. The custody of a child is in the nature of a trust and is upheld only so long as the duties of that trust are faithfully carried out.
3. ———: ———: ———: ———: **Contracts Relating to Custody.** Parties cannot make a final and absolutely irrevocable contract concerning the custody of their child save in the method pointed out by statute by apprenticeships and deeds of adoption. Nor can the court which renders a decree of divorce make a final and absolute decree as to the custody of the child. It is subject to modification as new circumstances arise from time to time.
4. ———: ———: ———: ———: **Guiding Principles.** In determining who shall have the custody of a child the supreme consideration to be ever kept in mind is the child's welfare. The rights of neither parent should be disregarded, but the welfare of the child is superior to the claims of either parent; even the wishes of the child itself must yield to that.
5. ———: ———: **Evidence.** In cases involving the custody of children, the evidence takes a wide range. No other occasion can call more loudly for judicial vigilance in reaching for the exact truth. The attitude of the parents toward each other, the causes leading to the divorce, their treatment of each other, and the character of the parties are all material and admissible in evidence as bearing upon the question of the fitness of the respective parents to have the custody of their child. This should be considered solely in order to arrive at what is for the good of the child, and not in any way for the purpose of gratifying the wishes of one parent or the other, or with any idea of punishment or of rewarding either parent.
6. ———: ———: **Facts Justifying a Change of Custody: Influencing Child Against Parent.** Any act on the part of one parent which tends, or will tend, to cause the child to lose respect for the other parent or prejudice the mind of the child

against its parent is an abuse of the trust. And where the evidence shows that the influences surrounding a child were such as to lead him to believe without cause that his father was not to be trusted; that he was not respected and had no standing in the community; that the father did not provide for him; that his father's family and relations were undesirable people all of which was without foundation; and that the child was led to imbibe unwholesome views of life; this will be deemed sufficient grounds for changing the custody of the child.

7. ———: ———: ———. The facts in this case considered and analyzed, it is held that, taking the whole cycle of the boy's career into consideration, and that he is now twelve-and-a-half years of age and about to enter upon one of the most critical periods of life and needs a father's advice and direction, and that at this age boys begin to escape their mother's apron strings and the influence and training of his father and the benefits of his father's society are what is best for him now, the custody of the boy should be, and is, awarded to the father under certain conditions.

Appeal from Jackson Circuit Court.—*Hon. A. C. Southern*, Judge.

REVERSED AND REMANDED (*with directions*).

McCune Harding, Brown & Murphy for appellant,
Vance Shouse Meredith.

Willard P. Hall and *Edwin A. Krauthoff* for appellant, *Edwin A. Krauthoff*.

TRIMBLE, J.—Herein we are asked to exercise our jurisdiction as a court of chancery in the adjudication of an exceedingly difficult, embarrassing, and important question—one that affects the most sacred feelings and reaches the profoundest depths of the human heart:—which of two separated parents shall be awarded the custody of their child. It is an unwelcome task fraught with heavy responsibility. In its performance, however careful and sympathetic we may be, we must walk with heavy tread into the very

sanctum sanctorum of parental affection, and, laying hands upon the jewel there enshrined, make such disposition of it as, in our finite wisdom, its best interests may seem to require. It is a painful duty, from which every well-regulated mind must shrink since its performance has to do not only with the tender relations of parent and child, but involves the future course of a human life, and perhaps may have an influence upon the destiny of an immortal soul. One thought, however, affords some slight comfort, and that is that we are in no way responsible for the causes which have unhappily brought about the situation with which we are confronted. We are called upon to act; the heavy obligation is laid upon us; and we have no choice but to meet it. Let those whose hearts are wrong remember this when, in their pain and tears, they realize the effect of this decree.

The object of this investigation is a boy, Samuel Vance Krauthoff, born December 18, 1902. He is, therefore, now nearly twelve-and-a-half years old.

The parents were married December 18, 1901, at Henderson, Kentucky, where the then young bride resided. Her mother, Mrs. Mary Vance Shouse, at the age of twenty, had been left a widow with one child, and the two were living at the home of the bride's maternal grandmother who was also a widow. At the time of the marriage above mentioned, Mrs. Shouse was under forty, and the relations between her and her daughter appear to have been peculiarly close and intimate. The mother was an almost constant companion of her daughter and seems to have held a dominant position and influence in her life even after the latter reached maturity and on down to the institution of this proceeding. She took part in the correspondence between the lovers during their courtship, and, when the ardent suitor visited the object of his affections, he saw almost as much of the mother as he did of the daughter. Immediately after the engagement, the

prospective young husband invited the mother to take up her abode with them in their new home which they were about to establish in Kansas City. She accepted, and, in May after the wedding, came to Kansas City to make her home with the young couple and thereafter remained with them throughout the rest of their married life. (The relevancy of all that is here said concerning Mrs. Shouse will hereinafter appear.)

At this time the husband was a member of one of the leading law firms of the city and derived a comfortable and constantly increasing income from the practice of his profession. The wife brought no dowry with her.

After living at the Coates House for a time, the newly wedded pair moved to a rented home from which, in the short space of two years, several moves were made to other quarters until finally they were living in a house for which the husband was paying a rental of \$90 per month. A lot was finally purchased at a price of \$3600 with the intention of erecting thereon a permanent home. Before anything of this kind was done, however, the wife and her mother found another lot which they thought brought them near to more desirable neighbors, and the result was that the first lot was exchanged for it at an additional outlay of \$1350 making the second lot cost \$4950. Upon this, in 1908, the husband erected a handsome home, the whole representing an expenditure of something over \$20,000, one-half of which was obtained by a mortgage on the property.

The union of these two proved to be unfortunate. The wife and her mother, feeling that they belonged to "a family of aristocrats," thought much of society and of social prominence, and desired to occupy a large place in the social world. The evidence shows that they were much concerned about the social standing of those whom they were called upon to recognize, being afraid they were not of their set or station. The hus-

band, although a courteous and polished gentleman, had never had time for so-called "society" and set small value upon its glittering but ephemeral triumphs. He came from a family that had neither the wealth nor the time, nor the inclination, to shine in the society world. His mother, the wife of an officer in the civil war, was left a widow in 1877, with five children to rear, and with scanty means upon which to do so. She was undoubtedly a remarkable woman of great ability, and possessed many excellent qualities of mind and heart. This is shown not only by the estimate of those who knew her and testified to the strength of her character and goodness, but also in the fact that of the three sons she reared and gave to the Republic, the eldest became one of the leading lawyers, first of Missouri, and then of New York, while another rose from the ranks, without the advantages of West Point, to a Lieutenant-Colonel in the United States Army, and the third, the youngest (the defendant), is a lawyer of reputation and ability. It was, therefore, natural and also inevitable that the members of this family, in their struggles for material, intellectual, and moral success, would have little to do with so-called fashionable society, and set small store by its allurements and distinctions.

This difference in the viewpoint from which the husband and wife looked upon life was an immediate, though doubtless not the final nor the chief, cause of their discord and unhappiness. Before the marriage the wife seems to have entertained some doubts as to whether her future husband had the social position she thought should be required of the man to whom she should be married, and very soon after the husband brought his wife to Kansas City, she declined to visit or have anything to do with his mother or sisters. This involved the question of taking the baby to see them after it became old enough to make such visits. The father would always encounter opposition to his

taking the boy to see his grandmother and many times this privilege was denied him. The grandmother was very fond of children and greatly enjoyed the child's visits. At every Yuletide she had a Christmas tree with presents thereon for the boy, and at one Easter, as the boy was on his way in company with his father to see his grandmother, he wanted to get her an Easter plant and the father bought it for him that he might make a present of it to his grandmother. When it was learned at the boy's home that this had been done, the mother announced that he could not go again. Along in 1906 or 1907 the grandmother became feeble and in delicate health, not however from any contagious or infectious disease. To her physician she so frequently expressed grief over the fact that she was not able to see her grandchild and was being ignored in her grandmotherly rights, that her doctor was of the opinion that it aggravated her condition. Thereupon her daughter, an aunt of the boy, called upon the mother and explained the situation and told her that the grandmother was in a critical condition, likely to die at any time, and that she was in a very unhappy state of mind because of the denial of the presence of her grandson, and asked the mother if she and the boy would not come to see the grandmother occasionally. To this the wife replied that she preferred to have the relations continue as they were, that when she married her husband, she didn't marry his family.

Without going into further detail at this time concerning their married life and their relations to each other, it is sufficient to say that receptions and dinners and similar society functions were given at the home, and the husband was urged to join certain clubs as a means of improving his social standing and obtaining social recognition; and the questions of their social life and of recognizing socially the friends of the husband, were matters of acute differences between them though he never objected to the society functions

given at his home. It may be observed here that there is no evidence that the friends or associates of the husband were improper or not of the right quality. So far as the evidence shows they were of excellent character and standing, occupied with their work and the task of upbuilding their community, and taking high rank in the various departments of civic, intellectual, and moral life, but entirely too earnest and busy to spend their time solely and exclusively in the social whirl. Nor should it be thought that the husband was so deeply absorbed in his professional duties as to be neglectful of his fireside. The evidence shows him to be of an exceptionally kind and gentle disposition, loving his home, attentive to its best interests, watchful in ascertaining and liberal in supplying every real or fancied need, devotedly attached to his son and manifesting and showering upon him a veritable wealth of affection from his babyhood to the present time. It also shows that he was deeply in love with his wife, and that that love continued even when he discovered that she did not love him, he hoping and fondly believing that her heart would yet turn to him and be his.

One evening in September, 1909, the husband discovered the wife in her room sobbing bitterly, and, upon inquiring the cause, his wife confessed to him that prior to her marriage she had been engaged to Mr. Meredith, that they had had a quarrel and became estranged during which she had married, but that she had never ceased to love Meredith and loved him at that time, and had never loved her husband. He tried to convince her that she was mistaken, and, in the endeavors to preserve his home and have the companionship of his boy, he appealed to his wife's mother to help him. Instead of doing so the mother sided with her daughter, and both announced they would immediately retain an attorney for the purpose of securing a divorce. For some time matters went along thus, their domestic relations becoming more and more

strained as time went on. The husband appealed to his family physician (a second cousin of his wife), and to his two law partners to assist him in composing the troubled affairs of his household. They acceded to his request and saw the wife and mother but to no avail. When the women learned that the husband had told these men of his wife's confession (and the evidence is he told no others), they told the husband they could no longer live with him as the head of the household since people would cease to respect them if they did. They told him there would have to be a separation and discussed with him the character of settlement he should make for the support of his wife and the boy. The husband, hoping against hope, and still fondly believing that his wife would return to his bosom, and that he would still have the companionship of his boy, agreed to make any arrangement that would be satisfactory to them. It is manifest from the evidence that he took this means of convincing his wife of his love for her, and thought by this method her love for him would sooner or later be called into existence, and that his home and fireside would be eventually restored. Aside from the home (which he had put in her name), and an interest in his law firm, the husband had no other property except a number of life insurance policies. These were brought home and the women went over them and picked out those having a cash surrender value, those policies being preferred as they did not care to rely upon the insured paying the premiums in the future. During these negotiations the wife's mother said to him "of course, if you had any money, you could give her a cash settlement, but as it is, we will have to take the promise to pay sums of money in the future." At that time the husband was paying \$500 a month for the maintenance of the home; and it was thought that \$150 per month would be needed for the husband's expenses and \$350 per month would be the proper amount for

the support of the wife and boy. The absolute title to the house was to be in the wife, the husband to pay all taxes and interest, pay off the encumbrance at the rate of \$500 per year and keep the property insured for not less than \$15,000. When all the details had been gone over and arranged, the husband made a final appeal to his wife to wipe out the past for the sake of the boy. In answer, she turned to him and said "you have to go." He left on the morning of November 6, 1909, taking with him only some personal clothing and some books.

On the 9th of November, 1909, a formal contract between them was signed, reciting that the parties had agreed, on account of unhappy differences, to live separate and apart for the future. In addition to the arrangements hereinbefore mentioned, the contract provided that "it is the intention of the husband to continue for the wife and child the home in Kansas City now occupied by them." Out of the \$350 per month the boy was to be clothed, educated and supported. If the boy died, the monthly allowance was to be reduced to \$250, and if the mother married anyone other than the father, all obligation to her should cease and the father should then pay \$150 per month for the support of the boy. The contract further provided that the custody of the boy should continue with the mother; that the father should have the right, "at all convenient and proper times and places, to have the child either brought or sent to the father to be with the father for such length of time as may be reasonably proper;" that until the child was fourteen years of age he should be educated in the public schools of Kansas City and thereafter at such institutions of learning as the wife might select and the husband approve, and the time of the child, when not at school, should be spent equally between the parties to the contract. It further recited that the wife was contemplating a trip to the continent of Europe in com-

pany with her mother and the child, and the husband agreed to pay the expenses of the three on that trip and, when notified of their desire to return to Kansas City, to supply the necessary funds for their return; that eight insurance policies on the life of the husband, aggregating \$10,126, had been assigned to the wife, all of which were fully paid except one for \$1000 the premiums on which he agreed to keep paid; and finally, the husband agreed to increase the insurance on his life in favor of the boy from \$5000 to \$20,000 and pay the premiums thereon and keep them paid.

At the time this contract was signed the husband had been obliged to remove from his home and was living at a hotel. His aged mother was sick with an incurable disease, and his two sisters were occupied in ministering to her. The boy lacked a month and a few days of being seven years old, and the provision for his custody was the best that could possibly have been made for him at that time. The contract is exceedingly long and cannot be reproduced here; but its whole purpose shows that the father was striving to secure and provide for the welfare and comfort of his wife and boy. The evidence shows also, and without dispute, that at the time the father made this contract (which he drew himself), he was sure that at some time in the future he would regain his wife and home, and that he purposely made the contract liberal in order to bring about that result, and in all that he did he was actuated by his absorbing love for the child.

Two days after the contract was signed, to-wit, on November 11, 1909, the wife filed suit for divorce, alleging that "the defendant has offered such indignities to her as to render her condition intolerable" but no indignities were specified or set out, nor was any mention made of the child. On the same day, the defendant, through his counsel, entered his appearance and filed answer admitting the marriage, denying all other allegations, and calling attention to the existence

of the boy. When the case came to trial, the defendant appeared by counsel but made no contest. The evidence taken at the trial was preserved and was introduced at the hearing of this controversy. There were no indignities testified to at the divorce trial. The only evidence submitted was that it was not possible for the wife to live longer in the same house with her husband and that they could not get along. One witness, of the three who testified, said "these two people, from the very beginning, have seemed to have a different point of view for everything. They were raised under different circumstances." After two witnesses had testified, the wife, was put upon the stand and was asked whether, having heard what the two witnesses had said, she "agreed to that view speaking generally of the situation?" To which she replied "yes." She was asked as to the age of her son, and then these questions were propounded and her answers given:

"Q. And you propose to take and keep him, and you are perfectly willing that the decree in this case may provide that the court, if you and your husband differ as to the conduct of the child, may at any time settle the differences between you? A. Perfectly.

Q. At present you should have care of the child?

A. Yes, sir; I think I can take better care of him.

Q. During his tender years? A. Yes, sir.

By the court: You say it is impossible for you to live together? A. Yes, it is impossible."

On this evidence a divorce was granted, the decree reciting that "the court does assume and retain jurisdiction of the child, for the purpose hereafter of making such orders with respect to the care and custody of said child as may from time to time be right and proper."

The evidence shows that on the day the decree of divorce was rendered, a Baedeker of Paris was bought and charged to the defendant and that he afterward paid for it upon presentation of the account.

Pursuant to the contract, the money for the European trip therein called for was promptly paid, and the former wife, with her mother and the boy, left for Paris, France. Before they left, and within forty-eight hours after the divorce, the former wife requested her ex-husband to care for her horse in her absence. This horse had been purchased for her by her husband, and it had at one time formerly belonged to Mr. Meredith. Before their departure, the defendant called upon his former wife and, showing her a letter he had received from her aunt in Kentucky expressing horror and regret at the turn matters had taken, told her that at any time she said the word the past would be forgotten and all would be wiped out. The appeal was of no avail.

The party left Kansas City for Europe, November 17, 1909. During their stay abroad the defendant regularly sent the monthly allowance, besides other sums for the boy, and papers and books for his amusement and the perusal of all. They did not return to America until the following spring. Upon their return, they stopped in New York, and at one or two fashionable summer resorts in New Jersey, then came on to Henderson, Kentucky, and finally arrived in Kansas City in July, 1910. On the 4th of August following, the boy's mother married Mr. Meredith. They, with the boy and his grandmother, Mrs. Shouse, went to live in the luxurious home hereinbefore mentioned which the defendant had built for the family that was then his own.

The \$350 allowance was regularly paid on the first of each month up to and including August 1, 1910, the defendant not knowing, at that time, of the impending marriage to Mr. Meredith. He was told of the marriage by his boy; and shortly thereafter, the defendant's health failed, he suffering a profound nervous breakdown. So serious did it become, that

his physician and his law partner advised him to take a sea voyage and trip to Europe and remain there until his health was restored. Arrangements were made whereby the defendant's law firm was to pay the \$150 per month for the boy's support, the \$350 allowance having ceased after the remarriage of the mother. This allowance of \$150 per month was regularly paid from October, 1910, up until either January or May, 1911, when, the senior member of the father's law firm thinking that \$150 was an unnecessarily large sum for the monthly requirements of a young boy in view of the father's continued illness, reduced the allowance to \$50 per month. (Afterwards, the father restored it to \$150 per month, beginning with November 1, 1913.)

In August, 1911, the father returned to Kansas City, but as his health was still poor, he went to San Francisco to visit his army brother stationed there. While in California he was restored to health, and returned to Kansas City in excellent physical condition, and immediately resumed the active practice of his profession and has continued therein ever since with no abatement or diminution of his strength.

On the 24th of September, 1913, the father was married to Miss Daisy Lovering of San Francisco.

For some time before this marriage, various difficult and annoying restrictions had been thrown about the opportunities of the defendant for seeing his boy and upon the visits of the latter to his father. Immediately following the father's remarriage, the privilege of having his boy visit him was at once forbidden. Upon notice being given that the father would apply to the court granting the divorce for an order enforcing his rights, the visits of the boy were again permitted, but under annoying restrictions and limitations, and of such a character as to embarrass the father and son in their relations toward one another and to seriously interfere with the father's influence over the

boy and the latter's filial affection and esteem for his father. Observing this and also that his son was beginning to have erroneous ideas concerning the character and reputation of his father and to entertain what appeared to be unwholesome views of life, the father, on February 17, 1914, filed an application in the court wherein the divorce was granted, reciting the fact of the divorce, the subsequent remarriage of the mother, and the reservation of jurisdiction in the decree concerning the custody of the child, and alleging that "a question has arisen between the parties hereto as to the care and custody of said child, and the parties are unable to agree with regard thereto" and closed with a prayer "that the court may hear testimony regarding said question and make such orders touching the care and custody of said child as may be for his best interests and welfare."

Thereupon, the parties appeared, and the father offered a vast amount of evidence upon the subject. The mother was represented by counsel and the witnesses were carefully cross-examined; but she introduced no evidence in her behalf except that on suggestion of her counsel and with the defendant's consent, the trial judge examined the boy privately in his chambers but not upon oath, which examination was taken down by the stenographer, reduced to writing and, by agreement, made a part of the record.

After hearing and considering a mass of evidence (which in the abstract of record covers over 500 closely printed pages in small type), the court, on June 4, 1914, rendered its decree which, after reciting the facts concerning the former decree of divorce, the subsequent remarriage of the mother, and that both plaintiff and defendant appeared in person and by counsel, declared that "it appearing to the court that said Samuel Vance Krauthoff will be twelve years of age on December 18, 1914, and that he is in good health; and it appearing to the court that said boy

has been, ever since the divorce and is now, in the custody of his mother, the plaintiff; and after full and careful consideration of all the evidence in the case, the court does find that at the present time and under existing circumstances, it is to the best interest of the boy, Samuel Vance Krauthoff, that he be placed in the custody of his father, the above-named defendant." It was thereupon decreed that from and after June 11, 1914, the boy be in the custody of his father, and that both plaintiff and defendant appear in court on September 1, 1914, for a further consideration of all the facts in evidence and which might thereafter arise affecting the welfare of the child, and for such further order as the court might deem right in the premises, the court reserving full jurisdiction to make such further orders touching the custody of the boy as may seem to be for his best interests from time to time, in doing which, the court was to have power to consider evidence introduced on this hearing and such other evidence as it should deem fit and proper.

On September 14, 1914, the father, as directed in the decree, appeared in court, and it was announced that the boy was within the jurisdiction of the court, and, at the request of his mother, had been sent to her home upon his arrival in Kansas City that morning. Some question then arose as to the nature of the investigation to be made or steps to be taken at this time, and as to who had the burden of proof. The boy had grown considerably during the summer and was in fine physical condition. The court remarked that there had been an order of absolute custody made in the case; that if no further showing was made the order would stand as it was, or would probably be renewed, and that the burden was on the plaintiff. Whereupon her counsel announced that they wanted to know what had been done with the boy during the summer. Thereupon the defendant offered testimony to show that the boy had been sent for the summer to a school for boys

on the Hudson river in New York; and as the plaintiff had raised some question as to the nature and character of his surroundings since the decree of June 4th, this matter was thoroughly gone into. Upon this feature of the case, testimony *pro* and *con* was introduced sufficient in extent to swell the record to an aggregate of 1173 pages of solid print in small type.

At the conclusion of this hearing, the court, after considering the evidence offered at both hearings, entered an order that "The custody of Samuel Vance Krauthoff is hereby awarded to his father, Edwin A. Krauthoff, upon the following conditions:" These conditions were that the boy should be allowed to visit his mother every week at her residence, and be under her direction, from five o'clock p. m. Friday till five p. m. Sunday, except that on the first Sunday in each month he was to return to his father's house at noon Sunday; that he be permitted to visit his mother during all of the Christmas Holidays; and that he be permitted to visit his mother and be under her direction from June 10 until the first of August of each year. The order closed with the words: "This order contemplates that the residence of the parties hereto shall remain in the jurisdiction of this court." From the decree, as thus modified, both the father and the mother have appealed; and thus the burden of solving a most delicate, perplexing and difficult question is laid upon this court, namely: What is for the best interests of this very intelligent, well developed and promising American boy?

By reason of the separation and divorce of the parents, the child became a ward of the court in which the decree of divorce was rendered. [Sec. 2370, R. S. 1909.] And jurisdiction to award the custody of such child vested in that court to the exclusion of all others. [In re Gladys Morgan, 117 Mo. 249.] Such jurisdiction is a continuing one, giving the court power to modify its decree as to the custody of the child, from

time to time, as circumstances change and new facts and conditions subsequently arise to make a modification necessary. [Phipps v. Phipps, 168 Mo. App. 697, l. c. 700; In re Kohl, 82 Mo. App. 442; Shannon v. Shannon, 97 Mo. App. 119.]

In 1913, the Legislature of Missouri passed "An Act to give married women equal rights with their husbands to the custody of the persons of their minor children." [Laws of Mo. 1913, page 91.] The first section of that act made the husband and wife, while living together, joint guardians of their minor children "with equal powers, rights and duties." By section 5 it was provided that the husband and wife, living apart, "are entitled to an adjudication of the circuit court as to their powers, rights and duties" in respect of the custody of their unmarried minor children, "without any preference as between the said husband and wife, and neither the husband nor the wife has any right paramount to that of the other in respect of the custody of such children." Section 6 provided that in all proceedings involving the custody and control of such children, "the rights of the parents shall be equal, and neither parent as such shall have any right paramount to that of the other parent, but in each case the court shall decide only as the best interests of the child itself may seem to require." Aside from giving the mother, as a married woman, the right to act as guardian for her child, and removing the common law preference of the father in the matter of its custody, thereby putting the two parents on an equality in that respect, it is not seen that the statute makes any change in the existing law. The case of *People ex rel. v. Elder*, 90 N. Y. Supp. 703, was a contest between parents for the custody of their child eleven years old. There was a statute in that state much like ours above mentioned. Prior to the divorce the father had made a contract with the mother giving the custody of the boy to her. After the divorce he took possession of

the boy. About the only effect the statute seemed to have had in the case is shown in the remark that "under the statute the mother and father are now equal in their rights of guardianship over their children and therefore the mother is not confronted as heretofore with the common law preference for the father." The evidence showed that the father had practically banished his wife from her home and suggested that she get a divorce. The court awarded the custody of the child to the mother, not on the strength of the contract, but because she was rearing the child properly and because the father, although not unfit personally to have the child, was not so situated as to be able to look after it carefully. While, in many cases, it is said that under the common law the father has the paramount right to the child's custody, yet this does not mean an absolute or supreme right. The preference was given to the father, but if for any reason the welfare of the child called for a different disposition, the courts awarded the custody to the mother, or even to third persons, if circumstances required it. [In re Blackburn, 41 Mo. App. 622, l. c. 628.] In such cases, the question of custody was determined "not on the naked question of right of custody in either parent, but invariably on the determination of the question which our courts hold to be paramount to all others, namely, the welfare of the child itself." [Brewer v. Carey, 148 Mo. App. 191, l. c. 207; In re Berenice Scarritt, 76 Mo. 565; Brennaman v. Hildebrandt, 137 Mo. App. 82.] Hence, the Act of 1913 did not create a new rule or principle upon which such cases are to be decided, but merely placed the mother upon the same legal level with the father in respect of her eligibility to be selected as the custodian of her child. But the right of neither parent is absolute, nor can it become so by contract or agreement. That right cannot be acquired in ways analogous to those in which property rights are obtained. The custody of a child is rather

in the nature of a trust reposed in the parent. It is a qualified right given for the discharge of important trusts, and is upheld and secured only so long as the duties of that trust are faithfully carried out. [Purinton v. Jamrock, 195 Mass. 196, l. c. 201; *In re Moore*, 11 Irish Common Law Reports 1; Hochheimer on the Custody of Infants (2 Ed.), 24.] For this reason the solution of the question presented in the case at bar is not to be controlled or determined by the contract entered into before the divorce no matter what construction may be placed upon it, or what effect the provision of the decree of divorce, subsequently entered between the parties, had upon it. It is not seen how the language of the contract in the case at bar can be construed as irrevocably giving the custody of the child to the mother, though it does seem to contemplate that the custody which is then confided to the mother may continue till the child reaches the age of fourteen. But as said before, the evident purpose of the contract, at the time it was made, was to safeguard the welfare of the boy, with the hope that, in time the family would be reunited and he would then have the benefit of the joint care and protection of his parents. In addition to this, the divorce decree rendered two days later between the parties to this contract, the terms of which decree the mother clearly understood and consented to before it was entered, expressly made the custody of the child a continuing, temporary, and not a final, matter. In fact, the parties could not have made a final and absolutely irrevocable contract concerning the custody of their child if they had intended to do so, nor indeed could the court have rendered such a decree. [*In re Scarritt*, 76 Mo. 565, l. c. 582; *In re Blackburn*, 41 Mo. App. 622, l. c. 630; *Swift v. Swift*, 34 Beav. 266; *Johnson v. Terry*, 34 Conn. 259; *Waldron v. Waldron*, 1 Johns 27; *People v. Mercein*, 38 Am. Dec. 644; *Kuhn v. Breen*, 101 Iowa, 665; *Carpenter v. Carpenter*, 149 Mich. 138; *Child v.*

Dodd, 51 Ind. 484; Pierce v. Pierce, 30 Mont. 269; Legate v. Legate, 78 Tex. 248; Cook v. Cook, 1 Barb. Ch. 639; Chapsky v. Wood, 26 Kan. 650, l. c. 653; Wilson v. Mitchell, 111 Pac. 21; 29 Cyc. 1604, 1605; Dix v. Martin, 171 Mo. App. 266, l. c. 273; Ex parte Ingenbohs, 173 Mo. App. 261, l. c. 272.] But, as stated, the parties did not attempt to do this, and the decree expressly reserved jurisdiction "for the purpose hereafter of making such orders with respect to the care and custody of said child as may from time to time be right and proper." Consequently, in deciding this case we are not bound by any mere legal or contractual rights of either parent. So far as the law is concerned the mother and father stand upon an equal footing. The fact that the custody of the child was given to the mother is, of course, a circumstance to be considered and weighed along with the evidence bearing upon what shall be done with the child at the present time. The fact that the father gave his child into the custody of the mother and that it has been with her during the past years cannot control the matter. These facts enter into the consideration thereof, of course, and should cause us to be all the more careful and be more certainly convinced of the necessity of a change, and of the correctness of our course, if the situation heretofore existing is to be disturbed. In considering such facts, however, we must bear in mind the situation of the parties at that time, the tender age of the child, the fact that the mother was provided with a home while the father had none, and that the arrangement was made with the hope on the part of the father that his home and his boy would ultimately be restored to him. It was a good arrangement at that time; the best that could have been made under the circumstances. The question, however, now is, shall that arrangement continue in view of the circumstances that afterward arose and are now existing?

In answering this question we must bear in mind that the welfare of the child is the supreme consideration to be ever kept in mind. [In re Blackburn, 41 Mo. App. 622; In re Scarritt, 76 Mo. 565; McKim v. McKim, 12 R. I. 462; Wilson v. Mitchell, 111 Pac. 21; D'Alton v. D'Alton, 4 Prob. Div. 87, l. c. 91; Corrie v. Corrie, 42 Michigan, 509.] While the rights of neither parent should be disregarded or overlooked, yet the welfare of the child is superior to the claims of either parent. [English v. English, 32 N. J. Eq. 738, l. c. 743.] To that welfare "the claim and personal desires of the parents and even the wishes of the child must yield, especially if such desires or wishes are opposed to that object." [Kune v. Miller, 40 Wash. 125, l. c. 128; 14 Cyc. 805; 9 Am. & Eng. Ency. of Law (2 Ed.), 867, 868; Umlauf v. Umlauf, 128 Ill. 378.]

In cases of this character, the evidence necessarily takes a wide range. [McKimzie v. State ex rel., 80 Ind. 547; Berkshire v. Caley, 157 Ind. 1, l. c. 10.] "No other occasion can call more loudly for judicial vigilance in reaching for the exact truth." [Corrie v. Corrie, 42 Mich. 509.] And in determining where the custody of a child shall go, the acts and attitude of the parents toward each other, the causes leading to the divorce, their treatment of each other, and similar matters, are all material, and admissible in evidence as bearing upon the question of the fitness of the respective parents to have the custody of their child. [In re Pray, 60 How. Pr. 194; Wilson v. Elliott, 73 S. W. 946; Welch v. Welch, 33 Wis. 534, l. c. 542; Beene v. Beene, 64 Ark. 518; Hill v. Hill, 82 N. E. (Mass.), 690, l. c. 691; Wilson v. Mitchell, 111 Pac. 21, l. c. 27; Farrar v. Farrar, 39 N. W. 226; Williams v. Crosby, 118 Ga. 296, l. c. 297-8; Hunt v. Hunt, 4 Greene (Iowa), 216, l. c. 222; Miner v. Miner, 11 Ill. 43; People ex rel. v. Brooks, 35 Barb. (N. Y.) 85, l. c. 93; Simmons v. Simmons, 134 Pac. 791, l. c. 794.] It may per-

haps be well to observe here that this evidence should be considered solely in order to arrive at what is for the good of the child, and not in any way for the purpose of gratifying the mere feelings and wishes of one parent or the other, or with any idea of punishment or rewarding either parent. [Hochheimer on the Custody of Infants (2 Ed.), 94.] The fitness of the respective parties, their adaptability to the task of caring for the child, their ability to control and direct it, the age, sex, health, and surroundings of the child, and the influences likely to be exerted upon it, are all to be considered. [Hochheimer, 93.]

Going now to the character of the parties to this sad controversy, it appears from the evidence of many witnesses of high standing, and of unquestioned ability to form just estimates of human character and attainments, that the father's standing and reputation is of the best. He is shown to be a high minded, honorable, sincere man; a good lawyer and citizen; kind and charitable, broad minded, even tempered and generous. His love for children is marked, and his devotion to his child has been already stated. His professional income is shown to be in the neighborhood of \$11,000 per year. He is forty-six years of age and in good health. His present wife, Mrs. Daisy Lovering Krauthoff, is shown to be a woman of lovely character, of unusual poise and mental capacity, a sweet and gracious woman, patient, kind and charitable in her nature and a lover of children, with considerable ability in the matter of securing their obedience, confidence and esteem. In the years prior to her marriage, she helped to educate her delicate younger brother, and had, to a large extent, the rearing and education of an orphan niece. She is in perfect sympathy and accord with her husband in his desire to obtain the custody of, and to give a home to, his boy.

The fact that the court is asked to award the custody of the child to the father renders it necessary

to make the foregoing statement as to the character and disposition of the two above-mentioned persons. And this, in turn, calls for a statement concerning the mother of the boy, lest silence upon that subject might give rise to an unwarranted and unfavorable inference in that regard. No attack is made or accusation brought against her moral character. The disclosure to her first husband of the fact of her prior engagement to and love for another, carried with it no taint or suspicion of anything unlawful or immoral. The defendant has always regarded, and in this case has treated, that unhappy episode as the mistake of a young girl in marrying one man when she loved another. And several of defendant's witnesses testified on cross-examination that they knew nothing against her character as a good woman: In justice to Mr. Meredith it should also be said that the record discloses no treatment of the boy that was unkind or improper on his part.

The father, however, does charge that the persons, in whose care the boy has been heretofore, have unwholesome views of life so that his son is beginning to manifest and reflect tendencies of an undesirable nature; that he has been surrounded by those who, to say the least, did not feel kindly toward the father and prejudiced the boy against his father without cause; that the boy has been taught and caused to believe that no one respected his father, that his father's family was one to be ashamed of; that the son has not been allowed to freely visit or associate with him or his relatives, and when this was permitted it was under such limitations and conditions as to necessarily interfere with their relations and hinder the growth of love and confidence on the part of the son towards the father.

We very greatly regret the necessity of saying so, but a perusal of the testimony in this voluminous record, a portion of which is in the shape of correspondence from those nearest the boy and having great

influence over him, compels us to say that these charges have been undoubtedly established. We need not be so uncharitable as to say these results arose through malice or vindictive feelings on the part of the mother toward the father. So far as the mother herself is concerned, they seem rather to have been brought about by certain views of life and of things in general, by a lack of regard and care for the rights, hopes and aspirations of the father with respect to his child, and by a failure to realize the duty of instilling into the mind of the child a feeling of love, confidence and respect toward its father. Nevertheless, the fact remains that, consciously or unconsciously, she has permitted the unfortunate conditions hereinabove mentioned to exist and flourish.

A regard for the feelings of all concerned, as well as the length of this opinion, prompt us to avoid any minute and detailed analysis of the facts upon which the above conclusion is reached. The importance of the matter, however, imperatively calls for the statement, in general terms at least, of a few of the grounds therefor.

There is no dispute over, or contradiction of, the *facts* offered as the basis of the father's complaint. They stand unimpeached in the record and no attempt was made to refute them.

The father's love and solicitude for the boy is undoubtedly great. Ever since he was born, the father has evinced a deep and abiding affection for his son. During his baby days and early childhood the father's care and fondness for the companionship of his son was so marked as to attract the attention of the neighbors. The boy's affection for him was also marked. When he was two-and-a-half years old, his mother and Mrs. Shouse took him on a trip to Europe leaving the father behind, and the grandmother's correspondence shows the child's love for the father and the desire of the child to get back to see him. After the parents

separated, and upon the return of the women with the child from their second trip to Europe, the boy still loved his father and cried when he was refused permission to go to see him.

Before their return from this second trip, the father was notified in writing that although he could have the boy with him for a time during the coming summer, yet it could only be while the father was away from Kansas City on his vacation; he could not have him in Kansas City; whenever he was in the city, the boy must be at his mother's home.

After the women's return from the second European trip in July, 1910, the evidence shows the father was unnecessarily and unreasonably restricted in his relations with the boy. He was not allowed to take the boy with him where he would come into the company of his friends and acquaintances, and, except upon one occasion, he was not allowed to keep the child over night although at this time he was almost eight years old. As an example of the annoying limitations thrown around the opportunities of the father to see his boy, the father, upon one occasion, had gone to dine at the home of one of the most prominent and reputable physicians in the city (the family physician hereinbefore mentioned, and a kinsman of the boy's mother), and had sent for his boy to come and visit him there. The evidence is that the boy was not allowed to go because the physician's wife "wasn't in society." When the father learned that the boy could not come, he immediately went to the place where he was living and again sent the servant for the boy to come to him there and he was allowed to go. Being thus prevented from taking his boy with him to call upon friends and neighbors, and the father having no other children for the boy to play with, the father was practically limited to taking his boy to the parks and picture shows in order to amuse him.

As hereinbefore stated, in the fall of 1910, the father became ill and was compelled to take a trip to Europe. His illness continuing, his senior law partner reduced the monthly payments for the boy's support from \$150 to \$50. These payments were always made by depositing them in the bank to the mother's credit. They had never been made to the boy. Consequently, she was the only one who had need or occasion to know of the reduction. From this time forth, the dominant and most potent influence over the boy in the Meredith household (his maternal grandmother, who seems to have always assumed charge of him), began to exhibit the most marked and open hostility and contempt for the father. And from this time the child began to manifest a lack of confidence in and respect for his father. No good would be subserved by setting out the letters and the various acts disclosing this unhappy situation. They show beyond question that the father was regarded merely in the light of a source of supply of money for the boy a portion of which, was desired for him that he might spend summer vacations at fashionable resorts in the east. Once a communication was addressed to the father in March saying \$350 would be required for his summer trip, and that, as soon as the money was received, the trip would be arranged. Afterwards the boy asked his father about his coming vacation and the father promised that when the time came the money therefor would be forthcoming. The answer of the child shows that he entertained a conviction, obtained from his mother, that they could not be sure about the vacation until the money was actually in hand and that it was safer that it be obtained some time in advance. Upon one occasion after the father had been restored to health, he asked for a statement concerning the expenditures made for the boy and received in reply a few general items conveying no information whatever, with a curt admonition accom-

paying it to "consult your contract. You certainly have in no way respected it."

The evidence in other particulars shows that the influences surrounding the boy led him to believe that he had a father whose word was not to be trusted; that the father was not respected and had no standing in the community; that he had failed to provide for his child, and that even the home in which the child lived did not come from him. There is also evidence that the boy was told that on account of a lack of money he was compelled to go to the public school, and the child was imbued with the idea, at that time, that only "toughs and poor boys" went there; that the boy also became imbued with the idea that his father's family and relatives were undesirable people; that the father, instead of using his money for the support of his child, had used it in buying a home for his sisters which was not true. While the father was ill in Europe, he communicated with his senior law partner and requested him to send some presents to the boy at the home of the boy's mother. His partner did so, and when the presents were presented at the door with the announcement to the boy that they were from his father, the grandmother called from the top of the stairs "It is a lie," and told the little boy not to believe his father had sent them, that he didn't think that much of him. Shortly after this, one of the servants in the house was talking to the little boy and telling him what nice presents his father, Mr. Krauthoff, had sent him; and she was thereafter forbidden by the mother to speak to the boy about Mr. Krauthoff or his relationship to him.

On September 20, 1913, the father told his son he was going to marry Miss Lovering of San Francisco. The boy manifested no opposition to the marriage, and as the father was about to leave for California for the wedding, he asked him if he would not like to write a little note of congratulations and good

wishes so that it would be received on the wedding day. The boy said he would, and thereupon the father gave him an addressed and stamped envelope in which to send the letter. The boy took the envelope home to write the note, but when the envelope reached San Francisco it contained no letter from the boy but instead an insulting and abusive communication from the boy's grandmother.

Upon the return of the father with his bride to Kansas City, he called the boy's home over the telephone for the purpose of requesting that the boy be permitted to come to see him. His request was peremptorily refused, the refusal being accompanied with a disparaging remark concerning the lady he had married. When it was learned that the father was going to ask the court for permission to see his boy, the refusal was modified to the extent that the boy could visit his father *but only at his law office* on any day of the week except Saturday or Sunday and not in the presence of the new Mrs. Krauthoff. This was practically a denial of the father's right to the society of his boy, and was not acceptable to the father, who, upon inquiring the reason for such a restriction, was told it was not on account of any objection to his wife, but because Mrs. Meredith didn't want the father to see the boy in the presence of any woman who was married to the father and was not the boy's mother, this notwithstanding the fact that the boy for years had been in a home where the husband was not his father. Upon the father declining to submit to any such restrictions, the mother agreed to let the boy visit his father any Sunday convenient for her to let him go if the father would arrange to send a taxicab for him. The father was unwilling that his boy should form the taxicab habit and was of the opinion that he was old enough to ride on the street cars instead of using such an expensive mode of conveyance. There-

after, the boy was allowed to go to see his father, but was required to return at unreasonably early hours in the afternoon. In the course of these visits the defendant discovered the conception the boy had of his father, and the results of the influences with which he had been surrounded. He therefore filed the application which is the foundation of this controversy.

In the case of *In re Taylor*, 59 Eng. Rep. 846, it is said that "to have a child grow up without filial respect for its parent will have the worst possible effect upon the mind of the child." In *Carpenter v. Carpenter*, 149 Mich. 138, it is held that any act on the part of the mother which tends, or will tend, to cause the child to lose respect for its father will be deemed sufficient cause to transfer the custody of the child to the father. In *English v. English*, 32 N. J. Eq. 738, l. c. 748-9, it is said that if any influence is exerted over the child by its mother, or by those about it, to prejudice the child's mind against the father, it is an abuse of the trust. "One of the objects of the law is to foster and encourage mutual affection between parent and child. An important purpose of education is to train children to the cultivation of affection and obedience. If it appears otherwise, or if she (the mother) permits those in whose society the child is thrown, by act or word, to alienate his affection from his father, she has abused her trust." In *Sherwood v. Sherwood*, 56 Iowa, 608, the mother obtained a divorce; and the custody of the child, a boy of six or seven, was awarded to her. Two years later the father applied for its custody. It was awarded to him. The court remarked, "The unsuitableness of the mother was not shown to be marked, but the evidence did show that she labored to estrange the child from the father and this tends to exercise a deleterious effect upon the child." In *Miner v. Miner*, 11 Ill. 43, l. c. 52, it is said "The child, though in the custody of its mother, is a ward of the court, and any attempt

on the part of either parent to alienate its affection from the other would be held to be an abuse of the child, which the court would consider it a solemn duty to prevent." In *Wilson v. Mitchell*, 111 Pac. 21, l. c. 30, it is said "The explanation of the aversion of the child to his parent is not satisfactory when it is remembered that prior to this contest there was no aversion but the tenderest love and affection. . . . The aversion has to some extent been instilled in the child, and if plaintiffs in error retain possession of him, the estrangement will be still further increased. Under such circumstances it is of prime importance to protect as far as possible, the welfare and happiness of this child of tender years from the effects of the loss of respect and affection for his mother." In *D'Alton v. D'Alton*, 4 Prob. Div. 87, l. c. 90, the court said: "If either parent should make use of the access and influence over the child against the other parent, I should interfere to deprive the disobedient party of the right of access." In *Miller v. Wallace*, 76 Ga. 479, the contest was between the maternal grandparents and the father, and the court at page 493, said: "The plaintiffs seem not to regard them (the mother and sisters of the child's father) as socially their equals and look upon them rather as their inferiors in point of culture and refinement, but this estimate of their character and fitness for this delicate trust is not borne out by others who have testified in the case. The plaintiffs are evidently prejudiced against the defendant and his family, and if his child is committed to their exclusive care and management there is danger at least that they might instill it with their prejudices and great aversion and distrust instead of the love and confidence she should habitually cherish for him and which according to the laws of God and man is his due." In *Dimmitt v. Dimmitt*, 167 Mo. App. 94, l. c. 103, the court in awarding a child of two years to its mother, said she must not act so as to cause the practical es-

trangement and separation of his child from the father, and that if the mother "should attempt to discourage the father's proper visits by making them difficult and disagreeable, she will suffer the penalty of having her child taken from her."

It is urged in plaintiff's behalf that she should not be held responsible for the grandmother's acts or influence over the child. But the evidence clearly shows that the two women were of the same mind concerning many things; that Mrs. Shouse was the mother's agent and other self in matters pertaining to the boy, and that all the mother's requests and business communications were transmitted by and through her mother, Mrs. Shouse. The evidence also clearly shows that the mother neither objected to nor made any effort to counteract the influence of Mrs. Shouse, or to remove the atmosphere of suspicion and distrust concerning his father with which the boy was surrounded. She admitted that she never spoke to her son concerning his father during all the years she had him in her household except to communicate the fact to him that his father desired to see him; that she never told him his father was a good man, and never said anything to him about his father one way or the other. She may not have been aware of the precise language used in some of Mrs. Shouse's remarkable communications, but it is inconceivable that she was not aware of the general feeling and spirit Mrs. Shouse was manifesting toward the defendant, and of the effects thereof produced upon the plastic mind of the child.

Under these circumstances what shall be done with the boy? Shall he be allowed to remain where he has been, to grow up with false views of life and erroneous notions concerning the character and good name of his father and the real worth of his paternal ancestry? When he was examined by the judge in his chambers at the first hearing in May, 1914, the boy displayed remarkable strength of intellect and powers of under-

standing for one of his age; and yet to questions asked if he was not aware that his father was a talented successful lawyer, a good man, and stood well in the community, the boy's invariable answer was "I don't know."

The mother has had this boy during his tender years, and he is now approaching that period when a boy begins to escape from his mother's apron strings and when he needs a father's guiding hand and directing influence. Shall we permit sentiment and sympathy for a mother's desires to control and determine our action? The natural rights of a parent should not be disregarded it is true, but the best interests of the child must be primarily consulted. And in this case it must be remembered that it is a parent on *each* side who is asking for the boy, for one of whom the child is likely to lose his affection, and to look upon that one with dislike and suspicion though that parent has been the supplier of all his material needs even the home in which he has been sheltered.

In *Lusk v. Lusk*, 28 Mo. 91, l. c. 93, it is said: "The leading principle is to consult the good of the children rather than the gratification of the parents." In *State v. Giroux*, 19 Mont. 149, l. c. 160, the court, speaking of contests between parents for the custody of their children, says "in the adjustment of these conflicts mere sentiment and involuntary sympathy have no place." "No sentimentality should attend proceedings of this character, but the permanent interest and welfare of the child should be the great aim and end to be attained." [*Schneider v. Schneider*, 143 S. W. 265, l. c. 266.] In the case of *In re Steele*, 107 Mo. App. 567, l. c. 569, it is said: "While courts recognize and appreciate the claim of the mother to her child, yet no mere sentiment is allowed to overcome a consideration for the welfare of the child itself." In *Hibbette v. Barnes*, 78 Miss. 695, the court says that in inquiries like this "We have not solved the trouble until we have

come to a sound comprehension of what the law embraces in the scope of that phrase 'the best interest of the child.' " And in the course of the opinion the court remarked that "Too much disposition is manifested in some cases to consult, not the permanent well being of the child so much as its immediate enjoyment; to stand, not at the center of the whole circumference of the facts making up the life of the child from childhood to manhood or womanhood, but in that segment of those facts relating to what merely will make the child happy at the age he may be when the custody is determined." And then, in giving what it thinks is meant by the best interest of the child, the court says: it is "that which, in the whole view from the age at which the children are when the court is called upon to decide to the years of majority, most surely will build up fine characters and make them fit for the successful discharge of the duties devolving upon them as men and women; not that which merely gilds with rainbow hues the childhood sky."

Under all the circumstances disclosed in this record, many of which it is deemed best not to specify more particularly than has been done, we think the chancellor was right in his decree of June 4, 1914, when he awarded the custody of the boy to his father. Looking to the future, and taking into consideration the whole of his career and the proper equipment he should have to meet the responsibilities of life, we believe that the influence and training of his father and the benefits of his father's society are what is best for him now. He is about to enter upon one of the most critical periods of life and needs a father's advice and direction; and it is of vital and far reaching importance that he should know of his father's love, and have respect and confidence in him.

With regard to the modification of the decree by the order of September 22, 1914, we do not think there was anything shown to have transpired since the de-

cree of June 4th requiring such modification. It is not necessary to decide whether the court *had power* to modify the former decree at this subsequent term in the absence of any new facts arising to justify a modification, as the decree of June 4th seems to be, on its face, a temporary and experimental order, not intended as a final adjudication of the matter but only as a preliminary disposition of the boy in order to see how matters would work, and to enable the court to finally make up its mind as to what should be done. What we mean to say is that there was nothing developed on the latter hearing really militating against the father's fitness to have charge of his son or reflecting on his care and disposition of him during the summer. The evidence failed to show that the school at which the boy was placed was unfit or improper, or that his physical, moral or spiritual needs were neglected and ignored. The school is undoubtedly one of the best of its kind in the United States. The most that can be said against the advisability and wisdom of the father's disposition of the boy during the summer is that the boy was far from home and alone among strangers. However, in the main, he seems to have been happy and contented while there, though, of course, in his correspondence with his mother he expressed a very natural desire to see her; but his growth and splendid physical condition negative any idea that he was not well cared for or that he suffered any real injury or harm.

It is said that this placing of the boy off at school shows that the father does not really desire the society of his child, and that it displays a want of sympathy for him and a lack of regard for the boy's feelings. We do not so regard it. The situation in which the father was placed should be borne in mind. Although the decree gave him the custody of the child it was plainly a temporary trial arrangement, to last only for a short time, at the end of which the boy was to be

brought back into court with the whole matter of his custody open for consideration. The time afforded was entirely too short for the father to establish any permanent arrangement for the custody of his child nor indeed could he do so as long as the question of final custody remained open and undetermined. The evidence shows that while, and so long as, the father and his present wife were away from Kansas City, the relations between them and the boy, who was with them were loving and pleasant, and the old feelings of confidence and respect were in process of being restored; but a return to Kansas City marked the revival of the unfavorable indications and unpleasant experiences. If the father kept the boy in Kansas City he could not refuse to allow him to visit his mother's household frequently, and hence the situation would be no better than before. Besides, there is evidence to the effect that the boy while in Kansas City was being subjected to the unpleasant notoriety produced by this contest, and it was, therefore, best for him that he be taken out of the zone of that influence. The boy had lost practically one school year during his second trip to Europe. After the decree of June 4th he had expressed to his father a desire to attend West Point and manifested considerable taste and interest in military matters. Therefore, thinking the boy could catch up the year he had lost, and that it would be best for him at this time to get away from the conflicting influences of two households and the turmoil and strife of his parents concerning him, the father took his son to this Academy for boys where he could be taught habits of regularity, self control, neatness and obedience, and receive training that would prepare him to enter West Point should he continue in his desire for a military career. It may be that the boy was too young to have any final or definite ideas as to a military career, and doubtless his expressed preference therefor was but the manifestation of a boyish love for

the mere showy attractions of a military life. But the father should not be blamed for responding to what he thought was the manifestation of the boy's natural bent and make-up. Nor do we attach any importance either way to the fact that the boy, having spent a summer in the school in question, from which he could see West Point at close range and obtain a better knowledge of what a military career involves, has now no desire therefor. It neither means that his experiences of the summer were a hardship upon him, nor that his mother subsequently influenced him to change his mind in regard to the profession of arms. It is rare that a boy of his age has any well founded idea as to what he is to do or be; but the training he was getting at this school, while it had military features, was in reality of a general educational nature, and would prepare him to enter any field he might afterwards choose. The father was not attempting to arbitrarily force upon him a profession regardless of the boy's wishes and desires. We agree with the trial court that what the boy needs now most of all is a place in his father's home and the companionship of his father *as a comrade*; and that is what the father must give if the latter is to regain the place he once had in the affections of his son. But in the short time allotted to the father under the order of June 4th, there was no opportunity for this to be accomplished, under the circumstances in which both father and son were then placed. The evidence is that the father proposes to take the son into his home and be a comrade to his boy if the latter be given definitely into his control. It is upon this understanding that we make the disposition hereinafter directed.

There was no evidence offered at the hearing in May and June to controvert the facts presented by the father in support of his claim for the custody of his boy. And at the September hearing the sole issue was as to the care taken of the boy during the summer.

There was no evidence adduced at this time calling for so great a modification of the terms of the order made in June. The evidence justifying the placing of the boy in the father's custody was just as strong and impressive in September as it was in June, and no facts were shown to impeach it. We are unable to see anything to justify the divided custody made by the last order. According to it the boy is to be "under the direction of his mother" from five p. m. Friday of each week till five p. m. Sunday, and from June 10th to August 1st of each year. Consequently the father has no opportunity to see or be with his boy on Saturdays and only for one-half of ten Sundays in the year, and never at Christmas time. This division of authority would, in our opinion, result in great harm to the boy. Neither parent could exercise any salutary control under that situation and the conditions disclosed by the evidence in this case would not improve but grow worse. The Highest Authority has said, "No man can serve two masters," and He understood humanity as no other ever did. A divided custody will undoubtedly keep the child constantly embroiled in his parents' dissensions. He "should have a home with the one or the other of his parents and not be shifted from one to the other at brief intervals." [Dimmitt v. Dimmitt, 167 Mo. App. 94, l. c. 103.] It is detrimental to the welfare of a child to shift it from family to family. [State ex rel. v. Bird, 253 Mo. 571.] The child should not be troubled with its parents' quarrels. [D'Alton v. D'Alton, 4 Prob. Div. (Eng.) 87.] They should not be made "the sport of never ending contests between rival claimants for their custody and control" nor a "bone of contention, an apple of discord and constant *casus belli* between them." [People ex rel. v. Brooks, 35 Barb. (N. Y.) 85, l. c. 87.]

Since the submission of this case we have been informed, through supplemental briefs filed by both sides, that the father has removed from Kansas City

and has established his home in Washington, D. C. This requires us to notice that feature of the decree which speaks of the residence of the parties, and to also determine the question of the removal of the boy to Washington City.

The divorce suit and decree therein rendered in the circuit court of Jackson county vested jurisdiction in said court to pass upon the custody of the child, and that jurisdiction continues until the boy reaches his majority. [Wald v. Wald, 168 Mo. App. 377.] Both parents were parties to the divorce suit and hence are personally bound by its decrees and orders. And those orders are controlling upon and will be recognized by the courts of other States. So that a removal of the child to Washington City is not a taking of the child beyond the jurisdiction of the court in the sense that the court would thereby lose jurisdiction to change its order in the future should subsequent events require it. The jurisdiction of the court over the child will not be ousted thereby. [State ex rel. v. District Court, 128 Pac. 590, l. c. 593; Morrill v. Morrill, 77 Atl. 1; Stetson v. Stetson, 80 Me. 483, l. c. 485; Bailey v. Schrader, 34 Ind. 260; Wakefield v. Ives, 35 Iowa, 238.] In the Stetson case it is said the awarding of the custody to a parent may result in the removal of the child beyond the limits of the State in any case, since there is no authority, except in cases of crime, to prevent the parent's immediate removal to another State; but that since jurisdiction has attached, then even though the parent and child may not be personally within the jurisdiction of the court, the subject-matter is and the court's judgments will be valid and binding.

The courts have not hesitated to allow a parent, to whom the child has been awarded, to take it to another State, or even to a foreign country, when the best interests of the child would be subserved thereby. [Tatum v. Davis, 144 Mo. App. 125; In re Bullen, 28

Kan. 781; Stetson v. Stetson, *supra*; Wilson v. Mitchell, 48 Colo. 454; Ex parte Davidge, 72 S. C. 16; Wood v. Wood, 5 Paige's Ch. (N. Y.) 596; Campbell v. Campbell, 37 Wis. 206; Griffin v. Griffin, 18 Utah, 98, l. c. 110; Giles v. Giles, 30 Neb. 624; Adams v. Adams, 62 Ky. 168, l. c. 170; Bedolfe v. Bedolfe, 127 Pac. 594; United States v. Sauvage, 91 Fed. 490; Freeman v. Freeman, 94 Mo. App. 504, l. c. 507; Brown v. Brown, 53 Mo. App. 453.] As showing what the parties thought concerning the residence of the child in Kansas City when they entered into the contract of November 9, 1909, it may be well to observe that said contract provides that "the wife at this time [is] neither to be understood as fully assenting to the continued residence of the child in Kansas City, Missouri, nor as definitely objecting thereto; that matter being left open as hereinafter provided." The provision referred to called for the matter to be settled by the court in case the parties could not agree upon a proposed change of the child's residence. During the years the child has been with its mother she has twice taken it to Europe, being at one time away from the United States from November till July.

So that unless the removal of the child will injuriously affect its welfare, there is no legal reason for refusing the father permission to do so. But no objection on the boy's account can be made to Washington. We take judicial knowledge of the fact that Washington City, the capital of our country, is an excellent place for the residence of this boy. The educational features and opportunities there afforded are unsurpassed anywhere. The only question that can be raised against taking the boy there is that his mother will be deprived of the opportunity of seeing him. But this can be provided for. Again, as intimated hereinabove, we believe that it is best for the boy to get away from the scene of this unhappy contest and be free from the conflicting influences of two households

so diametrically opposed in their thoughts and feelings toward each other and in their views of what is of real worth in American life. The father has never shown the least desire to prejudice the boy against his mother; on the other hand, in the limited opportunity he has had he has endeavored to teach him to respect and love his mother and to be careful in observing his duties to her. So that there is no danger of the boy ceasing to love his mother.

We are, therefore, of the opinion that the cause should be reversed and remanded with directions to award the custody of the boy to the father and that he be permitted to take his son out of this State to the city of Washington where he now resides; that the mother be permitted, at convenient times and periods, to visit her son at Washington amid suitable surroundings and under as pleasant conditions as the situation will permit, neither parent to do anything, either in spirit or by word or deed, to keep alive in his mind the unwholesome memories of the differences which unhappily have affected and separated them. The boy should correspond regularly with his mother and she must be kept informed as to his health, development, progress and welfare. And lest the expense of the visits to see her son be too heavy a tax upon the mother and too great a limitation upon her opportunities of seeing her boy, the latter is to be permitted to visit his mother for a month each year during vacation, the expense of the boy in going from and returning to his home to be borne by the father. It is assumed, of course, that care will be taken during these visits to avoid everything which may have a tendency to lessen the father's influence, else this may result in the discontinuance of such visits. The parties to this suit, and it is hoped the boy also in a year or so, cannot fail to see that it is to the best interests and happiness of all concerned, especially of the boy himself (whom both parents love), that all should earnestly

and unselfishly strive to make the best of the situation. Under the circumstances, no arrangement can be made that will not involve pain and sorrow, and, stricken hearts should and must be guided by that unselfish love which "seeketh not its own."

The judgment is reversed and the cause is remanded with directions to enter a decree in accordance with the requirements hereinabove set out. All concur.

ON MOTION TO MODIFY DECREE.

TRIMBLE, J.—Since the announcement of the foregoing opinion, plaintiff has filed a motion praying that the decree be modified in a number of particulars. Each of these has been carefully considered. We have no desire to make the terms of our decree any harder to be borne than necessity requires; and are, therefore, willing to make any modification which does not materially change the disposition of the case as made in the foregoing opinion, and that will not interfere with or affect the real welfare and best interests of the child. We are, however clearly of the opinion that, with possibly one exception, all of these suggested modifications should be denied. Some of them have for their basis reasons which could be advanced against any disposition of the child that might be made, and they rest on nothing more than what might be conceived of as a possibility in the future though there is nothing in the evidence to justify the thought that they will arise. Certain other requested modifications should be refused because the result of their adoption would be to subject the boy to the injurious effects of divided authority which it is so important to avoid.

Still others, we think, are wholly unnecessary as there is nothing in the evidence to justify their insertion in the decree and, if included, would involve a gratuitous assumption upon our part unnecessarily reflecting upon the parties hereto. Our decree is made

upon the assumption, and we confidently expect, that not only the parents of this boy and the boy himself but every one else connected with this unhappy controversy, will so conduct themselves as to assist, in good faith and to the utmost of their ability, in carrying out the spirit and intent of this decree.

With regard to one suggested modification, however (the exception above noted), we have concluded, not without some hesitation, that its adoption will not affect or interfere with the purpose sought to be accomplished by the decree. If future experience should develop that it does so interfere, then it, like any of the other terms of the decree, can be changed. That modification is this: In addition to the visit of one month during the summer vacation of each year, hereinbefore provided for, the boy shall be permitted to visit his mother for one full week at the Christmas Holidays, the mother to bear the expense of such Christmas visits. This modification of the decree will be a break in the eleven months separation of mother and son, and, if they make good use of the privilege thereby granted, no ill effects can come therefrom. It is in the confident belief that they will do so that this modification of the decree is made. All concur.

STATE OF MISSOURI at the Relation and to the
Use of ADDIE L. WHITLOW, Respondent, v.
AMERICAN SURETY COMPANY OF NEW
YORK, Appellant.

Kansas City Court of Appeals, June 4, 1915.

1. **PRINCIPAL AND SURETY:** Executors and Administrators: Partnership. If an administrator takes property into his hands under color of his office, and fails to account for it, his surety is bound therefor even if, as a matter of fact, it was not in reality assets of the estate.

2. ———: ———: ———. The improper appointment of an administrator *de bonis non* does not affect the liability of his sureties, if the administrator acts under the appointment; and, even if the letters of administration are void, the bond is good as a common-law bond.
3. ———: ———: ———. Where an administrator purchases property at his own sale and at one-half of the appraised value, the same is void and as if it had never been.
4. ———: ———: Final Settlement. In passing on the final settlement of an estate the probate court has power to go into all past accounts and settlements and correct any errors or invalidities anywhere throughout the administration.

Appeal from Cooper Circuit Court.—*Hon. J. G. Slate*,
Judge.

AFFIRMED.

W. G. & G. T. Pendleton for appellant.

W. M. Williams and *John Cosgrove* for respondent.

TRIMBLE, J.—This is a suit against a surety on the bond of an administrator of a partnership estate.

Addie L. Whitlow, at whose relation the suit is brought, is the sole heir, devisee and executrix of her father, Warner Whitlow, who died in Cooper county, Missouri, July 28, 1904. She administered upon and fully settled said estate and became entitled to receive all the property and assets thereof. Prior to her father's death he had secured the contract to do certain work on the "White River Extension" of the Missouri Pacific Railway in Arkansas. Desiring to have Joseph W. Skinner to superintend this work, Whitlow and Skinner entered into an agreement whereby Skinner agreed to superintend the work and the two would divide the profits. The work was completed in 1904 and Skinner, with Whitlow's consent took the paraphernalia, known as the "grading outfit" consisting of horses, mules, wagons, pile driver, blankets, scrapers, harness, etc., to St. Louis.

On August 11, 1904, directly after Whitlow's death, Skinner on his application was appointed administrator of the partnership composed of Whitlow and Skinner, and gave bond in the sum of \$2500 with the defendant as surety thereon. On August 23, 1904, Skinner inventoried the grading outfit and filed it in the probate court September 6, 1904, stating therein that Warner Whitlow had a half interest in said property and Joseph W. Skinner owned the other half interest. This property was appraised at \$1500.

Skinner continued to use the grading outfit until February 15, 1905, when the probate court, on motion of Miss Whitlow, ordered him to sell it. He did so and reported to the court that he had sold it for \$750 to O. Guinand. On April 13, 1905, the probate court approved the sale. No other report or settlement was made until January 15, 1907. Skinner reported earnings of the teams, etc., from July, 1904, to January, 1905, at \$2870 and took credit for expense in keeping the teams and wages paid the teamsters to the amount of \$2622.87.

A claim was then presented against the partnership estate by Mr. Skinner's wife which Miss Whitlow resisted and it was finally disallowed. Thereupon, in April, 1910, Skinner filed his final settlement in the probate court of the city of St. Louis showing a balance of something over \$750 in his hands for distribution which was ordered to be divided between Miss Whitlow and Mr. Skinner. The former appealed the case to the circuit court and from thence to the St. Louis Court of Appeals, where it was decided that the "grading outfit" was owned entirely by Whitlow and was not partnership property although a partnership did exist as to the profits to be made out of the railroad contract, but that no profits were in fact made. The cause was then remanded with directions. [In re Warner Whitlow, 184 Mo. App. 229.] Pursuant

to these, the probate court rendered judgment on October 16, 1914, directing Skinner, the administrator, to turn over the property, or the value thereof, to Miss Whitlow and upon compliance therewith that said Skinner stand discharged as such administrator. No appeal was taken from this judgment; and, although it is still in full force and effect, the administrator has never complied with its terms. He became insolvent and has been and is now a nonresident of the State.

This suit was brought in 1910 shortly after Skinner's final settlement was filed. It was tried in 1914 before the court without a jury and judgment was rendered for the full penalty of the bond, \$2500, to be satisfied by the payment of \$1500 the amount of damages found by the court.

This suit on the bond is for the value of the property taken by Skinner, as administrator of the partnership estate, but which in fact, as afterwards found by the St. Louis Court of Appeals, belonged solely to Whitlow. The answer admitted the appointment of Skinner as administrator of the partnership estate, the execution of the bond and that Skinner took possession of the property sued for, but set up that said property belonged to Whitlow individually and not to the partnership firm; that the same was sold by the administrator under an order of court moved for by relatrix and that she acquiesced in the sale and is now estopped to dispute its validity and is concluded as to the value of the property by the amount for which it sold. The answer further admitted that said Skinner has not delivered the property or its value to relatrix, the owner thereof, and that he is insolvent; and set up the claim that, since the property converted by Skinner did not belong to the partnership estate, defendant is not liable for any conversion thereof by the administrator.

The reply charged that Skinner claimed the property as administrator and held it as such and as

belonging to the partnership estate; that defendant executed the bond sued on knowing these facts, and that said Skinner kept the estate open for over ten years during which time defendant received premiums to indemnify it for the risk it assumed as bondsman of said administrator and made no effort to cause Skinner to settle said estate, and was, therefore, estopped to deny its liability on the bond sued on; that the probate court finally determined that relatrix was entitled to the property taken over by the administrator, or the value thereof, and that said judgment is now a finality. Said reply further denied that relatrix, at the time the property was sold, knew Skinner had no interest therein.

The first contention made by appellant, the surety company, is that it cannot be held liable for the misappropriation by the administrator of property which was not in fact assets of the estate, and that since the St. Louis Court of Appeals held that the partnership estate did not own the grading outfit, the surety cannot be liable for the value thereof. Undoubtedly the circumstances of this case show that the administrator claimed and continued to hold said property by *color of his office*, and that the bond given enabled him to hold and dispose of such property and maintained his claim for the years that he did. He not only obtained and held possession by color of his office but his claim was of such a nature as only a court of last resort could finally determine. In other words, the color of office by which he held possession was plausible and apparently good; it was not a plain and unquestioned wrongful exercise of authority. Whatever may be the rule in other States, it seems that in Missouri the rule is that if an administrator takes property into his hands under color of his office and fails to account for it, his surety is bound therefor even if, as a matter of fact, it was not in reality assets of the estate. [Gamble v. Gibson, 59 Mo. 585, l. c. 594; Dix

v. Morris, 66 Mo. 514; Lewis v. Carsono, 93 Mo. 587, l. c. 592; In re estate of Soulard, 141 Mo. 642, l. c. 672; McPike v. McPike, 111 Mo. 216; State ex rel. v. Purdy, 67 Mo. 89, l. c. 94; State ex rel. v. Scholl, 47 Mo. 84.] To hold the surety liable in this case does not extend the liability of a surety beyond the limits set by the above cases nor does it extend the liability beyond the limits contemplated by the parties when the surety obligation was entered into. The property could only be held and claimed by Skinner in his capacity as administrator. There was no foundation for any right in him as an individual whatever. Consequently, it was only through his official standing as administrator that he could assert a right to take possession of it and continue in his assertion of the right to dispose of it. Under the Missouri rule this renders his surety liable for his conversion thereof. It has been held elsewhere that the improper appointment of an administrator *de bonis non* does not affect the liability of his sureties if the administrator acts under the appointment. Shalter's Appeal, 43 Pa. St. 83; also that even if letters of administration are void the bond is good as a common law bond. [Williams v. Kierman, 25 Hun (N. Y.), 355; 11 Am. & Eng. Ency. of Law (2 Ed.), 880.]

It is next asserted that, if the surety is liable at all, it is only so for the proceeds of the sale of the property and not for its reasonable value.

The evidence tends to show that when the property was sold by the administrator under the order of the probate court, he in fact sold it to himself. He reported the sale as having been made to Guinand. This man was his brother-in-law. The evidence is that he was wholly unable financially to buy the property; that he was not present when it was sold but it was in fact bid off by another; that the administrator did not receive any money from him but, if he took anything at all, merely took his unsecured note therefor, and

instead of delivering the property to him, the administrator took the outfit over to Illinois and used it in his own business and as his own property. The evidence was ample to support the finding of the trial court that the administrator purchased at his own sale and at one-half the appraised value. This rendered the sale void and as if it had never been. [Ryden v. Jones, 1 Hawk. (N. C.) 497; Dwight v. Blackmar, 2 Mich. 330; Green v. Sargeant, 23 Vt. 466.] The administrator had no right to continue to use the property and charge the expenses of keeping it against the estate. [Richardson v. O'Connell, 88 Mo. App. 12; Exchange Bank v. Tracy, 77 Mo. 594.] And in order to stop that procedure the relatrix moved that the administrator be required to sell it. This was clearly a rightful move on her part. In asking that it be sold, she committed no wrong; she did not, by so doing, induce the administrator to sell to himself nor to do any other fraudulent or wrongful act in connection herewith. She did not induce the administrator to change his situation for the worse. He did not sell it in fact, but merely went through the form of a sale, and thereafter kept the estate open for a number of years until he had succeeded in getting away with the property. Nothing that relatrix did caused the surety to forego any of its rights. The evidence does not show that relatrix knew the sale was void or that it could be impeached after time it was made, or that it could be impeached during the years that followed. Certainly it does not show this fact conclusively so as to enable us to disagree with the trial court on that fact. So far as the fact that the property did not belong to the estate is concerned, surely relatrix ought not to be charged with failure to establish that fact any sooner since the administrator, supported tacitly at least by his surety, was steadily opposing any such effort. The failure to impeach the sale had nothing to do with its invalidity, and unless we can say the evidence con-

clusively shows relatrix was aware of the imperfections of the sale, we cannot say, as matter of law, that she slept on her rights and allowed the surety's status to be injuriously affected. If she did not do this, then she is not estopped because she asked that the property be ordered sold, since she did only what she had a right to do and neither the administrator nor his surety was led to change position. [Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, l. c. 396; Konta v. St. Louis Stock Exchange, 189 Mo. 26, l. c. 39; Blodgett v. Perry, 97 Mo. 263; Fowler v. Carr, 63 Mo. App. 486.]

The probate court of the city of St. Louis, obeying the mandate of the St. Louis Court of Appeals rendered judgment on the final settlement of said estate. That judgment, being unappealed from, is conclusive on appellant as a surety on the bond of Skinner. [Dix v. Morris, 66 Mo. 514; State ex rel. v. Creusbauer, 68 Mo. 254, l. c. 257; State ex rel. v. Shipman, 87 Mo. App. 569.] In passing on the final settlement, said probate court had power to go into all past accounts and settlements and correct any errors or invalidities anywhere throughout the administration. [In re Davis extr. of Williams Estate, 62 Mo. 450; McPike v. McPike, 111 Mo. 216, l. c. 225; North v. Priest, 81 Mo. 561.]

The inventory and appraisement made and filed by the administrator fixing the value of the property at \$1500 was evidence of its value at the time it went into the possession of said administrator. In addition to this, the witness Hogan testified it was worth \$2000 and Judge Rust said he thought it was worth \$1300. This evidence was sufficient to justify the trial court in fixing the value at \$1500.

Under the circumstances of this case we see no grounds for interfering with the findings of the trial court; nor is there any reason, under the Missouri rule concerning the liability of a surety on an administrator's bond, for holding that the surety herein is

Sailors v. Westchester Fire Insurance Co.

not liable for the value of the property which came into the administrator's hands under color of his office and which he wrongfully dissipated and converted to his own use. The judgment is, therefore, affirmed. All concur.

MRS. LOU SAILORS, Respondent, v. WESTCHES-
TER FIRE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, June 14, 1915.

FIRE INSURANCE: Total Loss. The plaintiff sued to recover from the defendant \$1500, as the three-fourths value of the face of a fire insurance policy on her furniture worth something over \$2000, which was totally destroyed by fire. The adjuster agreed to pay her \$1266.67, and she agreed to take it provided it was paid immediately. The adjuster then discovered the three-fourths clause in the policy and told her after she made up proof for \$1266.67, that they could only pay her \$950. This she refused to accept. *Held*, that since the evidence was conflicting it was for the jury to determine and their verdict is final.

Appeal from Bates Circuit Court.—*Hon. C. A. Calvird*,
Judge.

AFFIRMED.

Fyke & Snider and *W. O. Jackson* for appellant.

H. E. Sheppard and *Silvers & Silvers* for respondent.

TRIMBLE, J.—This is a suit upon a policy of fire insurance in the sum of \$1500 on the furniture and contents of a hotel which burned, and the insured property was thereby totally destroyed.

The policy contained a clause saying the "company shall not be liable for a greater amount than three-fourths of the actual cash value of the property covered by this policy at the time of such loss."

When the adjuster called upon plaintiff after the fire, she submitted an account or inventory of what she had lost. This inventory showed that the property cost something over \$2000 but, if we understand the record, did not say what the sound cash value was at the time of the fire. The adjuster took the inventory to the bank and went over it by himself and then told plaintiff the company would pay her \$1266.67 in settlement right away. She agreed to take that amount in settlement of the claim on the understanding that she would be paid at once as soon as the agreement could be sent to the company. Thereupon the adjuster prepared a proof of loss for the insured to sign. No amount was inserted in this paper as the actual cash value of the property but only that the total amount claimed of the company under the policy was \$1266.67 which was the amount Mrs. Sailors had agreed to accept in settlement of her claim. The plaintiff signed and swore to this document before a notary and the adjuster took possession of it.

Some time later in the day the adjuster came to Mrs. Sailors and told her he had found out that the policy contained a three-fourths value clause and he would have to reduce the amount to be paid her to \$950. She protested and refused to agree to that.

The adjuster, however, having the proof of loss in his possession, took it to Kansas City with him, and, before sending it in to the company, he inserted in it, with a typewriter, a statement placing the sound value at \$1266.67, and, erasing the amount which Mrs. Sailors had agreed to accept, placed it at \$950. As thus changed, the proof of loss was sent to the company and a draft for \$950 was mailed to her which she refused to accept. Thereupon she brought this suit.

The whole question is, did plaintiff agree with the adjuster that the actual cash value of the property at the time of the fire was \$1266.67? If she did, then she is entitled to recover only \$950. If she did not,

then as there was proof that the property was worth over \$2000, she is entitled to recover the amount the jury found in her favor, to-wit, \$1500.

The question whether the parties agreed in said proof of loss upon the actual cash value at the time of the fire was submitted to the jury, as was also the question whether the adjuster changed the figures therein and inserted a sum as the actual cash value with her consent, and the jury found for plaintiff.

There was ample evidence that the actual cash value was not stated in the proof of loss at the time it was signed and that it was inserted, and the amount claimed reduced to \$950, after the proofs reached Kansas City. The notary who swore the plaintiff to the proof testified, as did the plaintiff, that the actual cash value was not stated therein at that time and that the amount claimed of the company was not at that time reduced to \$950. In fact the adjuster admitted that he reduced this amount to \$950 and inserted the typewritten figures after he got to Kansas City, but claims that it was done with Mrs. Sailors' consent given after he told her of the three-fourths value clause. She denies that she consented or agreed to this, however, so the best that can be claimed in appellant's behalf is that the evidence is conflicting as to whether the adjuster and Mrs. Sailors agreed upon the value.

If there is substantial evidence to support the jury's finding it must be accepted. We have carefully gone through the abstracts of record filed by both sides and are fully convinced that there is sufficient evidence to amply justify the jury in its finding. According to the jury's view the only agreement made between the adjuster and Mrs. Sailors was as to the amount to be paid her on an immediate settlement, and that, as this was agreed to, no agreement was made as to the actual cash value. Aside from the statements of the plaintiff in this regard, the inferences to be drawn

from the evidence are that no statement as to the actual cash value was made or thought to be necessary until after the proof of loss had been signed and the adjuster had discovered the three-fourths value clause. There was no conclusive showing that Mrs. Sailors then agreed that the adjuster should insert an amount agreed upon as the actual cash value, or that she would accept \$950 instead of the amount offered in immediate settlement of her claim. The evidence on this being conflicting, it was wholly a jury question and their verdict is final. The judgment is, therefore, affirmed. All concur.

JOHN B. CROSS, Respondent, v. CHICAGO,
BURLINGTON & QUINCY RAILROAD COM-
PANY, Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **NEGLIGENCE: Railroads: Federal Employer's Liability Act.** The plaintiff sued to recover damages from defendant, for the negligent placing of a piece of "scrap" or "junk" rubber hose, so that when plaintiff descended a ladder on which he had been working cleaning an engine he stepped upon it thereby severely spraining his ankle. *Held*, that defendant's demurrer to the evidence was properly overruled.
2. ———: **Federal Employer's Liability Act.** The Federal Employer's Liability Act abrogates the rule regarding contributory negligence and merely permits such negligence to diminish the damages.
3. ———: ———: **Assumption of Risk: Federal Rule: Missouri Rule Under the Federal Rule Concerning Assumption of Risk.** When the employee knows of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer, or his representative, an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. Such, however, is not the Missouri rule.
4. **INSTRUCTIONS: Damages, Measure of.** An instruction on the measure of damages regarding the contributory negligence

of plaintiff which states: "Then such damage should be diminished by the jury in proportion to the amount of negligence attributable to him, as compared with the negligence, if any, attributable to the defendant" is erroneous.

Appeal from Linn Circuit Court.—*Hon. Fred Lamb*,
Judge.

REVERSED AND REMANDED.

Bailey & Hart, J. C. Carr and M. G. Roberts for
appellant.

Bresnehan & West for respondent.

TRIMBLE, J.—Respondent was employed in appellant's roundhouse at Brookfield, Missouri. When not engaged in operating the turntable, his duty was to wipe engines. In doing this a ladder was used on which to ascend and descend from the engine; and perhaps the employee stood on the ladder at times during the wiping process.

While thus working on an engine, he received a signal to go at once to the turntable. He descended the ladder and, in stepping from the last rung to the ground, his right foot trod upon a piece of hose three or four inches in diameter lying on the ground, whereby his ankle was turned and badly sprained. This suit for damages resulted, in which it was charged that the defendant was negligent in placing and permitting said piece of hose to remain on the ground at a place much used by employees in working about said engines whereby said place was rendered dangerous and unsafe.

The petition alleged, and the evidence showed, that the defendant was an interstate common carrier by railroad and that plaintiff was in its employ and engaged in interstate commerce at the time. The suit is therefore under the Federal Employer's Liability Act (35 Stats. at Large, p. 65, ch. 149, as amended by Act of April 5, 1910, 36 Stats. at Large, p. 291, ch.

143). The answer pleaded contributory negligence and assumption of risk.

In view of the verdict in plaintiff's favor, we must accept the evidence in plaintiff's behalf at its full face value, and it shows that the hose on which plaintiff stepped was a piece of "scrap" or "junk" hose about six or seven feet in length. It had been used in "blowing out" engines but had been run over and cut off, so that it was no longer fit for use but should have gone to the scrap heap. It was lying on the ground at the side of the engine on which plaintiff was at work and had been lying there for several days. The evidence further shows that defendant's rules required the foreman to see that the house was kept clean and in good order and that the workmen performed their duties properly. He had under him five men whose duty it was to "pick up all material and everything in the roundhouse and sweep the floors every day and clean up" and it was the duty of these men, if there was a piece of scrap hose lying on the ground, to pick it up and put it on the scrap pile. While there was evidence that the hose used in blowing out an engine was attached to a hydrant midway between two engines in their stalls, and that such hose lay on the ground until the blowing out process was over, yet the evidence was that as soon as the process was over, the hose was taken off to another engine; it was not allowed to remain on the floor indefinitely. Nor is there any evidence that during the time the hose was in use it was lying close to the engine where the wipers worked; but there was evidence that the piece of scrap on which plaintiff stepped "had been thrown back there," that is, close to the engine-side where it was trod upon by plaintiff when he stepped from his ladder.

From the foregoing resume of the evidence in plaintiff's behalf, we think it clearly appears that there was sufficient evidence to support a finding that defendant was negligent in allowing the piece of scrap

hose to lie so long on the ground at a place where the employees walked. [Johnson v. Kansas City Bolt & Nut Co., 172 Mo. App. 214.]

This brings us to the matters raised in defendant's answer, namely, contributory negligence and assumption of risk. With regard to contributory negligence, the Employer's Liability Act abrogates the rule which allows it to bar a recovery, and merely permits such negligence to diminish the damages. [See Sec. 3 of said act.] But said act leaves the rule of "assumption of risk" still in force except in the case of a violation by the carrier of a Federal statute. So that if plaintiff in this case was guilty of contributory negligence that will only result in a diminution of his recoverable damages. But if he assumed the risk it will defeat his recovery entirely.

Upon this branch of the case the evidence of plaintiff indisputably shows that the piece of scrap hose had been lying, where plaintiff stepped on it, for several days. Plaintiff admitted that he had seen this particular piece of hose there several times; he had seen it for several days and knew it was lying there; that he himself set the ladder right down by the hose; that the injury occurred about three o'clock in the afternoon of October 13, 1913, and he could have seen the hose as he came down the ladder if he had looked for it.

It would seem that the act of plaintiff in setting the foot of the ladder down close by the scrap of hose he knew was there, and which he could have easily kicked out of the way, and his act in coming down the ladder and stepping off to the ground without looking where he stepped, would constitute contributory negligence, since these were positive, affirmative acts on his part together with the neglect or omission to observe care for his own safety, and that these acts without care—i. e. negligence—"contributed" to his injury, that is, it joined with the negligence of defendant in bringing it about. If now it was contributory neg-

ligence and nothing more, then plaintiff's right to recover is not defeated but his damages are reduced.

But, if plaintiff occupied a broader status and if, by reason of his knowledge of the long continued presence of the hose-scrap, of which he never complained, he assumed the risk of injury arising therefrom, then his right of recovery is defeated. In which category is plaintiff to be placed in this case?

It would seem that the answer to this question would all depend upon what is considered as constituting assumption of risk. If we regard that rule as meaning that plaintiff, knowing of the defect and appreciating the danger, assumes the risk thereof even though the defect arises from the defendant's negligence, then perhaps plaintiff should be held to have assumed the risk in this case. But if we follow the rule that plaintiff does not assume the risk of a defect arising from defendant's negligence, then plaintiff should be said to have been merely guilty of contributory negligence.

The rule that a servant assumes the risk even of those dangers arising out of the master's negligence provided the servant knows of and appreciates them and he continues to work without complaint, is the one adopted by the Federal courts. [Seaboard Air Line Railway v. Horton, 233 U. S. 492, 1. c. 504-5.] Justice PIERCE here says, "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them." . . . "When the employee does know of the defect, and appreciates the risk that is attributable to it, then

if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty." [See, also, *Texas Pacific R. Co. v. Archibald*, 170 U. S. 665; *Choctaw & Gulf Ry. Co. v. McDade*, 191 U. S. 64, 1. c. 68; *Schlemmer v. Buffalo, etc., R. Co.*, 220 U. S. 590, 1. c. 596; *Gila Valley, etc., R. Co. v. Hall*, 232 U. S. 94, 1. c. 102.]

But this is not the rule in Missouri. [*George v. St. Louis, etc., R. Co.*, 225 Mo. 364, 1. c. 407; *Clippard v. St. Louis Transit Co.*, 202 Mo. 432, 1. c. 446; *Jewell v. Kansas City Bolt & Nut Co.*, 231 Mo. 176; *King v. St. Louis, etc., R. Co.*, 143 Mo. App. 279, 1. c. 298; *O'Brien v. Western Implement Co.*, 141 Mo. App. 331.]

Hence the question arises which of these two rules concerning assumption of risk shall be applied in this case wherein the rights of litigants, under a Federal law, are to be adjudicated? In the above case of *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 1. c. 507, it is said that the Employer's Liability Act, where none of the Federal Safety Acts are involved, leaves the matter of assumption of risk "open to the ordinary application of the common-law rule." What does this mean? Does it mean the common-law rule as determined by the courts of the various States or the common law as interpreted by the Federal courts? It would seem that since the Employer's Liability Act is a general law enacted by Congress to regulate the responsibility of interstate common carriers by railroad to their employees engaged in carrying on commerce between the States, the purpose of Congress was to establish one general uniform law in that regard, and that, therefore, not only the construction of that Act by the Federal courts but the rules of decision adopted therein in applying and enforcing the Act, should be binding upon the State courts. It is so held in regard to the liability of an interstate common carrier to an

interstate shipper for loss of goods created by the Interstate Commerce Act. [Adams Express Co. v. Croninger, 226 U. S. 491; Missouri, etc., R. Co. v. Harriman, 227 U. S. 657.] And similarly, in cases under the Federal Employer's Liability Act, it would seem that the rights of the employee and employer should be construed in the light of the Federal decisions. And such seems to be the holding in other States. In Southern Ry. Co. v. Jacobs, 81 S. E. 99, the Supreme Court of Virginia followed and applied the Federal rule in regard to assumption of risk instead of the rule in Virginia in that regard. In Freeman v. Powell, 144 S. W. 1033, the Texas Court of Appeals adopted the Federal view as to assumption of risk in direct opposition to the State rule on that subject, the court saying on page 1035: "Congress has undertaken to define the relative rights and liabilities of railway companies and their employees engaged in interstate commerce, and we do not think we have power to add to the Act of Congress by engrafting thereon an exception to the consequences that must ordinarily flow from appellee's undisputed knowledge of the defect and negligence complained of in this suit." In Glenn v. Cincinnati, etc., R. Co. 157 Ky. 453, the same rule concerning assumption of risk was applied though doubtless that was also the rule in that State. The same may be observed of the case of Farley v. New York, etc., R. Co., 91 Atl. (Conn.), 650. [See, also, Hardwick v. Wabash Railroad Co., 181 Mo. App. 156, l. c. 160.]

It is true, with the exception noted in Smith v. Alabama, 124 U. S. 465, l. c. 478, there is no Federal common law. Nevertheless, the Federal courts determine for themselves what the common law is. And this is especially true when they are passing upon *matters of general law* in which case they do not feel called upon to accept the views of State courts, but exercise an independent judgment even as to what is

or is not the true rule of the common law ; and certainly the question of the responsibility of an interstate railroad to its servants engaged in interstate commerce is one of general law. [Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368, l. c. 370 and 371.]

It is no doubt true that in many cases the Federal courts and the State courts are independent of each other in their views of what the common law is. And in those cases where the Federal courts lean toward the construction or rules adopted by the State courts or apply State laws, it will be found that the right or cause of action involved arose out of the law of the particular State involved. Such for example, was the case of Federal Lead Co. v. Swyers, 161 Fed. 687. The court in this case intimated that if the highest court in the State had construed a statute as taking away the defense of assumption of risk, it might have followed such construction. But the case involved merely a cause of action arising in the State; it did not arise under a Federal law affecting a general right applicable to all persons within the States coming within the limits of commerce affecting them all. And while the State courts, in passing on matters of purely State concern, are independent of the National courts in their view of what the common law is, yet it is hard to see how a State court, when called upon to apply and enforce a Federal statute, can disregard the rules of decision in regard thereto laid down by the Federal courts and follow its, the State court's, own rules not in harmony therewith. If it can, then the responsibility of an interstate carrier to its employees in interstate commerce will vary according to the view the various States may take of the common-law rule concerning assumption of risk. But Congress sought to *regulate* this responsibility, and having acted in the matter, it established a policy for all, and the liability as determined by the several States is superseded by

this one general supreme law. [Second Employer's Liability Cases, 223 U. S. 1.] In the above-mentioned case of Seaboard Air Line Railway v. Horton, 233 U. S. 492, l. c. 502, it was held that the phrase "any statute enacted for the safety of employees" in section 4 of the Act, meant any Federal statute. It would seem that when the court said the Act left the matter in respect to assumption of risk "open to the ordinary application of the common-law rule," it meant the common-law rule as enforced by that court and the other Federal courts following it. And those courts hold that if the danger is known to the employee, he assumes the risk even if it arises out of the master's negligence. [Boldt v. Pennsylvania R. Co., 218 Fed. 367; Seaboard Air Line Railway v. Horton, *supra*.]

However, in the case of Fish v. Chicago, etc., R. Co., 172 S. W. 340 (not yet published in the official State reports), a case under the Federal Employer's Liability Act, our State Supreme Court held that the meaning and effect of the United States Supreme Court decision in the Horton case, *supra*, wherein it said the matter was left "open to the ordinary application of the common-law rule" meant the common law as interpreted and enforced in the respective States. At page 345 the court say: "The effect of that decision and of the Act construed therein, and of the previous decision of the Supreme Court devolving concurrent jurisdiction upon the courts of the several States to enforce the provisions of said Act, is to require them, in passing on the defense of assumption of risk, to apply as a standard the common-law rule on that subject. This points a plain pathway—that of the common law as adopted, interpreted, expounded, and enforced in the respective States." The court then goes on to show that the common law, as administered in Missouri with regard to assumption of risk, is that the servant does not assume the dangers or perils caused by the negligence of the master, and that when the injury

is caused by a peril created by the negligence of the master, the only defense is that the peril was so great that no reasonable man could hope to escape by reasonable care; in which event the servant would be guilty of contributory negligence. It is true the petition alleged in that case that the servant did not know of the dangerous proximity of the standpipe to the track, but the proof was that he was notified there was some danger from its location. But even if the facts were that the servant in that case did not know of the defect or the peril, still the holding of the court is plain that the Missouri rule as to assumption of risk will be applied, and we defer to that holding. In *Hawkins v. St. Louis & San Francisco Ry. Co.*, 174 S. W. 129, the Springfield Court of Appeals, following the *Fish* case, announced the same view, though clearly, in that case, the facts did not violate the rule of the Federal courts as to assumption of risk since the servant did not know of the presence of the jack over which he fell.

The right sought to be enforced herein is a right under a Federal law, which gives jurisdiction to State courts to try such cases, with an appeal or rather writ of error lying to the United States Supreme Court from the judgment of the court of last resort having jurisdiction where the action was instituted. [*Missouri, etc., R. Co. v. Elliott*, 184 U. S. 530; *Gulf, etc., R. Co. v. McGinniss*, 228 U. S. 173.] It does not seem that, in a suit under a general Federal law intended as a uniform regulation affecting carriers and its employees engaged in interstate commerce, a State court will be allowed to apply its own particular rule which is not in harmony with the Federal rule. Especially does this appear to be so when a writ of error can be taken to the Federal court of last resort whose duty it will be to apply and enforce a general Federal law having to do with such an exclusively Federal subject as interstate com-

merce. It is not apprehended that, in such case, the United States Supreme Court will abandon its rule as to assumption of risk and apply the State rule. It is doubtless true, as suggested in the *Hawkins* case, *supra*, that the Bankrupt Law is intended to be uniform and yet State laws with regard to exemptions and fraudulent conveyances are enforced by the Federal courts. It will be noticed, however, that none of these laws are in conflict with Federal laws or rules of decision; and the causes of action affected by them are rather of local origin and scope and do not involve such general matters as those affecting interstate commerce.

We defer, however, to the views of our State Supreme Court on the matter in question and are thus relieved of the necessity of deciding whether the Federal or the Missouri rule as to assumption of risk should be followed in a case under the Employer's Liability Act, or whether there is any room herein for the application of the Federal rule. So that without regard to whether plaintiff's course of conduct in this case be merely contributory negligence, or whether it did not also amount to an assumption of risk under the Federal rule since he clearly knew of the hose, its location and the danger arising therefrom, we hold that the trial court properly overruled defendant's demurrer to the evidence.

Plaintiff's instruction on the measure of damages told the jury that in case they found the plaintiff guilty of contributory negligence, "then such damages should be diminished by the jury in proportion to the amount of negligence attributable to him, as compared with the negligence, if any, attributable to the defendant." This is erroneous. [*Norfolk, etc., R. Co. v. Earnest*, 229 U. S. 114, 1 c. 122.] The Supreme Court says that the statute means that where the negligence causing the injury is partly attributable to the employee and partly to the carrier "he shall not recover full

damages but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." The above instruction is also held erroneous in Nashville, etc., R. Co. v. Banks, 161 S. W. 554. We cannot say the error was not prejudicial since we have no means of knowing the comparisons of negligence made by the jury. Whether this above instruction would be more favorable to defendant or not depends upon the relative amount of negligence the jury charged against the parties. For instance, suppose the full amount of damages was \$2000 and the jury thought the negligence to be charged to the plaintiff should be stated at two and the defendant's at eight. In that case plaintiff's negligence, according to the instruction, would be one-fourth as much as defendant's while according to the correct rule, it would be one-fifth of the whole damage. In that event the instruction would be more favorable to defendant than would the correct rule, since, under the instruction the full damages \$2000, would be diminished by one-fourth or \$500 leaving plaintiff's verdict to be \$1500 while under the correct rule the \$2000 would be diminished by one-fifth or \$400 leaving the verdict \$1600. But suppose the jury thought the negligence of the plaintiff was eight and that of the defendant two, then, under the instruction, plaintiff's negligence would be three-fourths, while according to the correct rule it would be fourth-fifths. In such case, under the instruction, the \$2000 would be diminished by \$1500 leaving \$500 as the verdict, while under the correct rule, the \$2000 would be diminished by \$1600 leaving plaintiff's verdict at only \$400. So that it all depends on where the jury places the greater negligence as to whether the instruction as given is favorable or unfavorable to defendant. Hence we cannot say the instruction was harmless. For this reason the judgment is reversed and the cause remanded. All concur.

In re FINNELL ESTATE, Appellant, v. JENNIE
F. HOWARD, Respondent.

Kansas City Court of Appeals, June 14, 1915.

ADMINISTRATORS: Dower in Personalty: Distribution. The phrase "dower in personal estate" occurring in section 117, Revised Statutes of Missouri 1909, refers to the widow's share in the personalty of her deceased husband, equal to the share of a child of such husband, given by section 349. So that when an intestate died leaving a widow and one child, and the widow had taken \$400 worth of property at its appraised value under section 316, on this distribution between the widow and the child, said \$400 should be deducted from the share going to the widow under said section 349.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller*, Judge.

AFFIRMED.

Sam C. Major, M. J. Lilly and W. M. Williams for appellant.

Whitecotton & Wight for respondent.

TRIMBLE, J.—Lewis Finnell died, intestate, leaving a widow and an only child by a former marriage. The widow was appointed administratrix of the estate, and during the administration thereof applied for and was allowed \$400 worth of personal property at its appraised value given her under the provisions of section 116, Revised Statutes 1909. After doing this, and paying all debts and costs of administration, there remained in her hands belonging to the estate a balance, upon final settlement, of \$6965.23 for distribution. This she desired to divide equally between herself and her step-child, she being entitled to a child's part in the personal estate of her husband pursuant to the provisions of section 349, Revised Statutes 1909. The pro-

bate court, however, held that under section 117, Revised Statutes 1909, the \$400 she had already received should be deducted from her share and directed that \$3682.61 be distributed to the only child and \$3282.62 be paid to her, the said widow.

From this order of distribution the widow appealed to the circuit court where the same view of the law was taken and a similar order of distribution was made. From it she appealed to this court.

By section 116, Revised Statutes 1909, the widow was allowed to "take such personal property as she chose not to exceed the appraised value of \$400 for which she will give a receipt." Section 117 provides that: "The widow shall apply for such property named in the preceding section before the same shall be distributed or sold, *which shall be deducted from her dower in the personal estate if there be any.*"

What does this phrase "dower in the personal estate" mean or refer to? If it means or was intended to apply to the widow's share in the personal estate of her deceased husband, then the \$400 must be deducted from the widow's share in this case since that is what section 117 says must be done.

The widow's share in the personal estate of the husband in this case arises by virtue of section 349, Revised Statutes 1909, which says: "When the husband . . . shall die, leaving a child or children, or other descendants, the widow . . . shall be entitled absolutely to a share in the personal estate belonging to the husband . . . at the time of his . . . death equal to the share of a child of such deceased husband."

Whether the share going to the widow under this section can be technically and strictly called "Dower in Personalty" or not, nevertheless the fact remains that it is treated and called "Dower." Section 349 is the same as section 2189, Revised Statutes 1879, so

far as the point here involved is concerned. The St. Louis Court of Appeals, in *Hoyt v. Davis*, 21 Mo. App. 235, l. c. 240, speaking of this section, says: "The provision made by the statute for the widow out of the personal estate of her deceased husband has always been spoken of and regarded as dower since territorial times. The decisions of the Supreme Court from an early period likewise speaks of this provision as 'dower' or, dower in 'personalty.'" [See, also, *Hamphan v. Long*, 70 Mo. App. 351, l. c. 353; *Hayden's Admr.*, 23 Mo. 398.] In *McFarland v. Baze's Admr.*, 24 Mo. 156, l. c. 157, Judge LEONARD, speaking of sections 30 and 32 of chapter 2, volume 1, Revised Statutes of Missouri, 1855 (which are now sections 114 and 116 of the 1909 Revision, but specified only \$200 then), says: "The two hundred dollars worth of a deceased husband's personal property, which is allowed to the widow by the thirtieth section of the administration law, is expressly spoken of in the statute as a part of her dower in her estate." [See, also, *Hastings v. Myers*, 21 Mo. 519, l. c. 521, and *Cummings v. Cummings*, 51 Mo. 261, l. c. 263, where the right of the widow to this personal property "was part of her dower, expressly made so by law." In 1 *Woerner on Am. Law of Admn.* (2 Ed.), sec. 82, page 182, it is said: In Missouri the allowance to the widow is expressed by statute to be "in addition to dower," a part of which (property selected by her not exceeding the appraised value of \$400) is to be deducted from her distributive share in the estate (also given under the dower act and not under the Statute of Descents and Distributions) if in excess of \$400, but is not liable for debts." [See, also, *Griffith v. Canning*, 54 Mo. 282, l. c. 284; *Glenn v. Gunn*, 88 Mo. App. 423, l. c. 426.]

It would seem, therefore, that the Legislature, when it used the phrase "dower in the personal estate if there be any" in section 117, meant the child's part

in the personal estate of the husband to which the widow was entitled in case the husband died leaving a child, children or other descendants. The phrase means something, and if it does not mean that, to what else can it refer, and from what is the deduction to be made?

We do not think the remarks in *Waters v. Herboth*, 178 Mo. 166, l. c. 172, to the effect that sections 114, 115 and 116 were not designed to affect final distribution, and that the property covered thereby was to be separated from the estate and form no part of it either to the creditors nor the distributees, can be construed as militating against the view herein stated. The court was saying nothing about section 117 which is the section requiring the \$400 to be deducted. The court was merely answering the objection raised in that case that the construction therein adopted would conflict with section 120. The remarks are undoubtedly true, the property covered by the sections is thereby separated from the estate so that it is not to be administered. So that the widow gets said property whether creditors or others get their claims or not; but this does not prevent section 117 from requiring the \$400 to be deducted from the widow's share, equal to a child's part, in the personalty if there be any. Again, the court, in the case cited, was not dealing with the widow's share in the personalty equal to a child's part given her by the law under this section without any formal election on her part, but was deciding a case where the wife had died childless in which event the husband, under section 350, is entitled to one-half of the wife's real and personal estate absolutely, subject to the payment of debts. Neither this, nor the interest a widow may elect to take in the real and personal estate of her childless husband by virtue of sections 351 to 355 both inclusive, have anything in common with the property obtained under section 349. The property

obtained under the former sections can in no sense be termed or treated as "dower" since the property therein given is "in lieu of dower" and subject to the payment of debts except that which came to the husband from the wife. The difference between the rights conferred by section 349 and those conferred by sections 351-355 has been pointed out by the St. Louis Court of Appeals in *Martin v. Jones*, 155 Mo. App. 490. The property obtained under sections 351 and following, have never been termed or referred to as dower and hence decisions saying the widow is entitled to take, by election, property under these sections can also have her \$400, do not decide even by analogy that, in cases where the widow takes a child's part in her husband's personal estate under section 349, she is exempt from having deducted therefrom the \$400 received under section 116. The reason she is not exempt in this regard is merely because section 117 says she shall not be. It is true, at page 496 of the *Martin* case, Judge NORTON says the bounties allowed to the widow under sections 114-117 "are no part of her dower *proper*," and doubtless this may be technically correct, but it does not change the fact (nor was it so intended), that from early times personal property received by the widow under these sections was called dower in personalty so that we may be sure that is what the Legislature had in mind when it used the phrase "dower in the personal estate," in section 117.

The opinion in *Howard v. Strode*, 242 Mo. 210, does say, at page 219, that "the portion of the husband's personalty given to the widow by section 349 is not dower" but just before that, on page 218, the court refers to the fact "that the widow's interest in the husband's personalty is referred to as dower in section 117, Revised Statutes 1909," and in certain cited cases; and elsewhere on page 219 the court speaks of "the distinction between dower proper and the so-called dower in personalty" as having been pointed out

in *Ferguson v. Gentry*, 206 Mo. 189. The Supreme Court in this Howard case was not considering the meaning of the terms in section 117 but of something else. It does not, therefore, sustain appellant in her contention. The same is true of *Mesersmith v. Mesersmith*, 175 S. W. 914.

We are, therefore, of the opinion that the judgment should be affirmed. It is so ordered. All concur.

STATE OF MISSOURI, ex rel. CLARENCE I. SPELLMAN, Administrator, Respondent, v. PARKE-DAVIS & COMPANY, a Corporation, Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **ATTACHMENTS: Principal and Surety: Bond.** The administrator of Mullett brought this action on attachment bond, which was executed by the defendant's manager at the time an attachment suit was instituted by defendant company against Mullett. The defendant denies liability on the bond on the ground that the execution thereof was never authorized nor thereafter ratified. *Held*, that the defendant by pressing the litigation, of which the bond is a part, ratified the execution of the bond.
2. ———: ———: ———. The authority of an agent to execute a bond required by law to be under seal, must be shown and conferred by an instrument executed with the same formality. Ratification cannot be established by anything less than a writing under seal, provided, there is no element of equitable estoppel involved.
3. **STATUTE OF FRAUDS: Sales on Contracts of Corporations.** The contracts which the Statute of Frauds requires to be in writing, must be in writing, but as the Statute of Frauds does not require contracts within its purview to be under seal the contracts of corporations even for the sale of land do not have to be under seal.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

AFFIRMED.

Chas. M. Woodruff, James Cleary and Johnson & Lucas for appellant.

Jos. S. Rust and E. Wright Taylor for respondent.

TRIMBLE, J.—This is a suit upon an attachment bond. The defendant denies all liability thereon upon the ground that execution thereof was never authorized nor thereafter ratified. Upon a trial in the circuit court, the defendant's demurrer to the evidence was overruled and judgment was rendered in favor of plaintiff in the sum of \$745, from which the defendant has appealed. To clearly understand the case it is necessary to make a full statement of the facts out of which it grew.

The defendant is now, and was at the times hereinafter mentioned, a Michigan corporation with a branch house in Kansas City, Missouri. In the course of the business of this branch house, it had, at some time prior to May 29, 1905, acquired a note of Fred Mullett. J. P. Raymond was the general manager of said branch house, and he authorized a suit on said note to be brought by original attachment against Mullett, the latter being a resident of California. The attachment suit was filed on the above-named date, having for its grounds the nonresidence of Mullett. No summons was served upon him, but jurisdiction was obtained by levying the writ of attachment on certain property of Mullett's and garnisheeing certain of his debtors. The affidavit verifying the copy of the note attached to the petition was made by Raymond as "Manager of Parke-Davis & Company, the plaintiff named in the petition attached hereto." He also signed and swore to the affidavit for the attachment wherein he stated that "defendant is not a resident of the State of Missouri."

The attachment bond was in regular form, purporting to be from "Parke-Davis & Company, a cor-

poration, and J. P. Reymond, as security" and was signed thus:

"Witness our hands and seal this 29th day of May, A. D. 1905.

PARKE-DAVIS & Co., by (seal)

J. P. REYMOND, *Manager*, (seal)

J. P. REYMOND. (seal)"

It was approved by the circuit clerk on the same day.

Thereafter a trial of the suit was had, resulting in a judgment for the defendant. Thereupon the local Kansas City attorneys, who had brought the suit for Parke-Davis & Co. at the request of Reymond, sought permission from said company at the home office to appeal the case. Parke-Davis & Co. referred the matter to their general counsel who authorized the case to be appealed to the Supreme Court of Missouri. This was done, and the case was duly presented to that court where the judgment of the circuit court was, after several years, finally affirmed. The affidavit for appeal was made by J. P. Reymond as "agent at Kansas City of Parke-Davis & Company, plaintiff in the above entitled action." The bond for appeal was made with Parke-Davis & Co., as principal, with J. P. Reymond and Chas. F. Ayre, as sureties and the bond was signed "Parke-Davis & Co., by J. P. Reymond, Manager" and then by both J. P. Reymond and Chas. F. Ayre individually.

After the affirmance of the attachment suit Mullett died, and relator Spellman was appointed his administrator, and thereupon the present suit on the bond was instituted. Reymond, defendant's local manager, who executed the bond also died.

The object of the suit is to hold Parke-Davis & Company liable as principal on the bond. Plaintiff does not claim that Parke-Davis & Company authorized Reymond to execute the bond, but that after it was executed, the defendant corporation ratified his execution thereof by litigating the case in which the bond

was given and by carrying the case on appeal to the Supreme Court and presenting it there.

The theory of the defense is that the instrument is not under the corporate seal of the defendant; that as to corporations, no instrument executed by them can be considered a *bond* unless it is so made as to be strictly within the old common-law definition of a bond, namely, an obligation in writing under seal; that it is a rule of the common law that authority to execute an instrument under seal can be conferred only by a writing under seal, and, therefore, defendant's agent, Raymond, had no authority to execute the instrument sued on; and, as he was never authorized to execute said instrument, nothing done on the part of defendant can ever amount to a ratification unless it is also evidenced in writing and under seal.

There is no doubt but that, under the common law, an instrument in writing is not a bond unless it is under seal. [State ex rel. v. Clay County, 46 Mo. 731; State ex rel. v. Chamberlain, 54 Mo. 338; State ex rel. v. Thompson, 49 Mo. 188.] It is also fundamental that, under the law of principal and agent, authority to an agent to execute an instrument required by law to be under seal, must be shown and conferred by an instrument executed with the same formality, that is, it must also be under seal, at least where the agent acts outside of the presence of the principal. [Schnetze v. Bailey, 40 Mo. 69; St. Louis Dairy Co. v. Sauer, 16 Mo. App. 1; 31 Cyc. 1231.] It is, without doubt, also essential, in the law of principal and agent, that if the agent's authority is required to be in writing under seal, then ratification cannot be established by anything less than a writing under seal, provided, of course, there is no element of equitable estoppel involved. [Hawkins v. McGroarty, 10 Mo. 546; Borel v. Collins, 30 Cal. 408; Bordere v. Den, 106 Cal. 594; Riggan v. Crain, 86 Ky. 249; Judd v. Arnold, 31 Minn. 430; Overman v. Atkinson, 102 Ga. 750; Ingraham v. Edwards,

64 Ill. 526.] So that the question of defendant's liability in this case would seem to depend upon whether or not the abolishment, by our statutes, of the common-law distinctions between sealed and unsealed instruments, extends to corporate judicial bonds, and whether or not our law still requires such bonds of a corporation to be under seal. The bond in question was executed under private seals affixed by the Manager-agent Reymond which would doubtless be sufficient, so far as the instrument *itself* is concerned, *if* the agent had authority under seal to execute it; because, in that event, since he was not the keeper of the corporate seal, he would perhaps be entitled to use the seal he had, namely, his private seal. On the other hand, if the bond is not required to be under seal, the mere fact that private seals were affixed does not compel it to be treated as an "instrument under seal" since section 2773, Revised Statutes 1909, says: "the addition of a private seal to any such instrument shall not in any manner affect its force, validity or character, or in any way change the construction thereof." Hence, the question whether defendant's ratification of the bond in controversy can be shown by anything less than a writing under seal, is not affected by the fact that private seals were affixed to it at its execution. And this question depends upon whether or not the old common-law distinctions between sealed and unsealed instruments must be retained in dealing with corporate judicial bonds, that is, whether or not such an instrument, in order to be a *bond*, must come within the common-law definition thereof?

In Angell and Ames on Private Corporations (11 Ed.), sec. 219, it is said that although, under the old common-law rule, corporations could not contract, or appoint agents to do so for them, except by deed, yet, in modern times, the rule had been greatly though gradually relaxed; and that "in our own country, where private corporations of this kind, for every

laudable object, have been multiplied beyond any former example, on account of the inconvenience and injustice which must, in practice, result from its technical strictness, the rule has, as a general proposition, been completely done away. The course of modern decisions seems to place corporations, with regard to their mode of appointing agents and making contracts in general, upon the same footing with natural persons." The author then goes on to say that while corporations may yet appoint their agents or make their contracts with the same formalities demanded by the common law, they are no more compelled to do so than are individuals. And that, like individuals, they are subject to the rules of law and, therefore, their contracts as to matters which the Statute of Frauds requires to be in writing, must be in writing, but as the Statute of Frauds does not require contracts within its purview to be under seal, the contracts of corporations, *even for the sale of lands*, do not have to be under seal.

The above section of Angell & Ames is referred to, quoted from and applied, in *Campbell v. Pope*, 96 Mo. 468, l. c. 472. In that case the validity of an appeal bond of a corporation, the Pope Iron and Metal Company, was in question, the defendants denying that it was properly executed. The bond in that case was executed in exactly the same way as the one at bar, except that it was done by the president of the corporation while the one before us was by a branch Manager. This, however, makes no material difference. There was no action of the board of directors, and the court upheld the validity of the bond on the ground that the execution thereof was subsequently ratified. The corporation in that case *had a seal* but it was not used. Notwithstanding this fact, and notwithstanding there was no previous authorization of the bond, the court held that the corporation having been brought into court "is held to know what transpires in the suit" and

to have knowledge of the fact that an appeal had been taken and an appeal bond had been given and that this bond had been executed for it without the seal, and the court on page 474 says that in view of these facts and the further fact that during the pendency of said appeal in the Supreme Court for two or more years the corporation was represented by counsel, "we must hold that this knowledge and acquiescence in the act of its president, in executing the bond in question without attaching the corporate seal and in the manner it was executed and sealed, *amounts to a ratification and adoption of the act*, and gives to it, by such ratification, as much validity as if the corporation through its directors, by resolutions or vote, had authorized it to be executed in that way." (Italics ours). This decision was rendered in October, 1888, *before* the passage of the Act of February 21, 1893 (Laws 1893, page 117), which is now section 2773, Revised Statutes 1909, which reads as follows: "The use of private seals in written contracts, conveyances of real estate, and all other instruments of writing heretofore required by law to be sealed (except the seals of corporations), is hereby abolished, but the addition of a private seal to any such instrument shall not in any manner affect its force, validity or character, or in any way change the construction thereof."

After the passage of that Act, the Supreme Court, in *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565, upheld the validity of the deed of a corporation *conveying real estate* notwithstanding the fact that the deed did not have the corporate seal affixed thereto. It is true the corporation in that case had no seal, and the court held that since it had none and was not compelled by law to have one, it could convey real estate without the use of a seal, but that certain statutes required a seal, and, the statute relating to the form of corporate acknowledgments obviated its use only in case it had no

seal. But this does not mean that, if a corporation has a seal, a judicial *bond* cannot be created without the use of its seal. The court was dealing with *conveyances* in that case and held that, if a corporation had a seal, it must use it on corporate conveyances because section 2399, Revised Statutes 1889 (now Sec. 2790, R. S. Mo. 1909), and section 2514, Revised Statutes 1889 (now Sec. 3001, R. S. Mo. 1909), authorized corporations to convey real estate by deed "sealed with the common seal of such corporation" and the Act of 1883 (Laws 1883, p. 20, and which now forms a part of section 2799 Revised Statutes 1909), allowed the certificate of acknowledgement to a corporate conveyance to state that the "corporation has no corporate seal" only in case it, in fact, had none. So that, with regard to corporate *conveyances*, we have statutes which require the use of the corporate seal *if one exists*, but not unless it does. In the case of corporate judicial *bonds*, however, there is no statute requiring them to bear the corporate seal as in case of conveyances, and hence there is not the same necessity for the use of the corporate seal, if the corporation has one, as there is in the case of a *conveyance*. But defendant, in the case at bar, says the very term "bond," under the common law, means that it is an obligation in writing under seal. Undoubtedly true, but does the term "bond" now import that meaning since the distinction between sealed and unsealed instruments has been done away with? If this meaning of the term "bond" must still be preserved as to corporate judicial bonds, then how could the appeal bond in the Campbell v. Pope case be upheld? Under the old common law the term "deed" implied "a writing *sealed* and delivered." [2 Blackstone's Comm., 295; Rondot v. Rogers, 99 Fed. 202; McCabe v. Hunter's Heirs, 7 Mo. 355.] The seal was what distinguished it from a simple contract. [Strain v. Fitzgerald, 128 N. C. 396.] Hence, if a seal is required on all corporate bonds merely because a

seal is implied in the word "bond" under the old common law, it would seem that a seal would be more strongly required in the case of *all* corporate deeds since, in addition to the common-law implication in the word deed, the two sections of the statute above quoted (Secs. 2790 and 3001) provide for corporate deeds to be "sealed with the common seal of such corporation." But the Supreme Court in the Pullis case, *supra*, at page 586, says that the necessity for a corporate seal existing by virtue of sections 2399 and 2514, Revised Statutes 1889 (now Secs. 2790 and 3001, R. S. Mo. 1909, and which *relate only to conveyances*) was wiped out by the Act of 1883 in all cases where the corporation had no seal, and that too although the statute abolishing private seals did not refer specifically to said sections requiring a seal to conveyances, and did say "except the seals of corporations." Clearly, the implication is that if there were no *statutes* requiring the use of the seal on corporate deeds, no force would be given to the necessity for a seal arising out of the implication contained in the common-law meaning of the term "deed." And surely, if a seal were required on a bond merely because the common law implies a seal in the use of the term "bond," then the court could not, in the Campbell v. Pope case, *supra*, overlook the omission of the seal and give effect to a ratification of the instrument as a bond when that ratification was not evidenced by anything under seal, and especially when there was then no statute abolishing private seals. The whole truth of the matter is that the distinction between sealed and unsealed instruments has been done away with to such an extent that a judicial bond is no different from any other simple contract except, of course, that where it is a statutory bond, it must be given in compliance with, and under the circumstances specified in, the statute authorizing it. But, so far as the form of its execution is concerned and the power of the corporation to there-

after ratify its unauthorized execution, there is no difference between a bond and any other simple contract. Hence, we are of the opinion that defendant cannot escape liability on the ground that the bond in question lacked the corporate seal or was not ratified under seal.

Of course, ratification can only be made with knowledge of the facts, and defendant claims that while it knew that a suit was filed on the note yet there is nothing to show that it knew an attachment had issued or a bond in support thereof had been made. We think, however, there was ample evidence from which the jury could find that the defendant did know of it. The facts hereinbefore stated show that the note grew out of the branch business of the defendant; that Reymond was general manager thereof and it was therefore his duty to collect the debts due that business; that jurisdiction in the suit arose only by attachment and not through summons and that the suit could be instituted only by attachment. However, defendant says this merely shows knowledge on the part of Reymond and the defendant's local attorneys, and they had only the authority Reymond could give them. But the evidence also shows that after the case was decided in the lower court, defendant itself was consulted as to an appeal, and it referred the matter to its general counsel at its home office. That general counsel went over the record in the case (which *showed on its face* that the suit was by attachment), and then authorized an appeal. This general counsel assisted the local counsel in the preparation of the briefs in the Supreme Court and helped argue and submit the case and the litigation covered a period of something like seven years. After the Supreme Court had affirmed the judgment, plaintiff in the case at bar wrote defendant herein concerning its liability on the bond. Defendant also referred this matter to its general counsel and he wrote plaintiff not to annoy the estate of Reymond about the bond on

which he was surety since his signature thereon as surety was "little more than a matter of form, for this company is very much stronger financially than the surety." Thus it appears that, if Reymond instituted the attachment suit and executed the attachment bond without authority, nevertheless the defendant itself, by pressing the litigation on which it was based, ratified the execution of the bond with as much certainty and force as did the corporation in the *Campbell v. Pope* case, and that it appears that defendant knew there was an attachment bond in the case. Certainly there is ample evidence from which the jury could find that defendant knew it and no ground whatever for an appellate court to say it did not. The note grew out of the business of which Reymond was general manager. The debtor, Mullett, was a nonresident, and the only way suit could be brought to collect the debt was by attachment of property belonging to Mullett. When judgment in the attachment suit was rendered against defendant, the latter itself was notified and its permission sought to authorize an appeal. It turned the matter over to its general counsel with authority to act and that counsel, after due consideration, finally authorized an appeal, and thereafter, with the attachment feature in the record before him, participated in pushing the matter in the Supreme Court. The attachment suit was instituted in 1905, prior to the passage of the Act of 1907 (Laws 1907, p. 69) authorizing attachment suits to be brought against a nonresident without a bond. Hence defendant had no reason to suppose an attachment bond was not given, since an attachment suit at that time could not be brought without a bond. And when defendant appealed the attachment suit, that appeal "preserved the attachment in full force until the final determination of such appeal." [Sec. 2335, R. S. Mo. 1909.]

Some objection is made to the instruction given in plaintiff's behalf, but it is without merit.

The judgment is affirmed. All concur.

GEO. O. RICHARDSON MACHINERY COMPANY,
Appellant, v. JOHN J. NELSON et al., Re-
spondents.

Kansas City Court of Appeals, June 14, 1915.

1. **VENDOR AND VENDEE: Fraudulent Representation.** The plaintiff sold a threshing machine to defendants and took a chattel mortgage on it and on an old engine to secure notes given for the purchase price of the threshing machine. The machine did not work satisfactorily and defendants tendered back the machine, and demanded their notes and mortgages claiming they had been induced to purchase the machine through fraud. The plaintiff brought this action to foreclose mortgage and to obtain deficiency judgment. A verdict was rendered in favor of the defendants and plaintiff appealed. *Held*, that the jury having found for the defendants, the verdict must be accepted.
2. ———: ———: **Contracts.** Where a sale is made by written contract this does not preclude defendants from showing that its execution was procured by fraud. And testimony of such fraud does not vary the terms of such a written contract.
3. **INSTRUCTION: Fraudulent Representations.** In an instruction it is not necessary to tell the jury in so many words that the vendor must have known the representations were false and made them for the purpose of defrauding the vendees, the substance thereof being sufficient.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb*, Judge.

AFFIRMED.

J. A. Collet for appellant.

Gilbert Lamb and *Roy W. Rucker* for respondents.

TRIMBLE, J.—Appellant sold a threshing machine to respondents and took a chattel mortgage on it and an old engine to secure notes given for the purchase price. The machine would not work satisfactorily. Whereupon respondents tendered it back and de-

manded their notes and mortgage, claiming they had been induced to buy the machine through fraudulent representations. The vendor refused to take the machine back and brought this suit to foreclose the chattel mortgage and to obtain a deficiency judgment upon the notes. Vendees set up fraud in the sale of the machine to them. The jury found in their favor and vendor has appealed.

The evidence in behalf of the vendees tends to fully establish their claim that the vendor represented that the machine in question was first-class and would do good work; that vendor had allowed a customer, who wanted a machine of a different model, to use it for a few days until the machine he wanted could be obtained; that during these few days the machine had worked satisfactorily and threshed 1800 or 2000 bushels per day, which was an excellent record for such a machine; and that it would thresh wheat in any kind of straw raised in Missouri bottoms. The evidence also shows that these representations were untrue and that vendor knew they were not true since they had not allowed a customer to use it until the one he wanted could come, and instead of the machine having worked satisfactorily, vendor had had trouble with it before. The evidence also tends to show that said representations were made to induce the vendees to purchase and they did so relying on them. There was nothing in the appearance of the machine, or which an examination would disclose, to show that it would not work; and the fact that the vendees looked it over carefully as it stood upon the floor of the vendor's warehouse and thought it was alright does not contradict their testimony that they relied upon and said representations and were induced thereby to purchase. The evidence was also ample to show that the machine worked very poorly, and after vendees had given it a thorough trial and afforded vendor an opportunity to make it work

and the latter had failed, the vendees tendered the machine back.

Although the sale of the machine was made by written contract, yet this did not preclude respondents from showing that its execution was procured by fraud. [17 Cyc. 695; Johnson County Savings Bank v. Redfearn, 141 Mo. App. 386; Merchants National Bank v. Birsch, 154 Mo. App. 631; Carroll v. Peak, 156 Mo. App. 446.] The testimony as to the fraudulent representations did not vary the terms of a written contract. It merely showed that what appears to be a contract has no right to exist as such.

The representation concerning the machine and the character of the work it would do was certainly material, and the only purpose of making such representations and their effect would be to induce the vendees to buy. And the fact that the machine did not work satisfactorily before, and that vendor had trouble with it then, shows that the representation concerning its efficiency was known to be untrue.

We do not agree with appellant that respondent's instruction omits the element that the vendor must have known the representations were false and made them for the purpose of defrauding the vendees. It does not use these precise words it is true, but it required the jury to find that the representations were made, that there was nothing about the machine to disclose that it would not work, that the vendees believed the representations to be true and relied upon them in executing their notes, that the machine was not a good one and would not do good work, that the machine when used before the sale had not done good work, that all of said facts were known to the vendor at the time said machine was sold and said representations, if any, were made, and that upon discovery that the machine would not work, if it failed to do so, the vendees tendered it back, then the jury were authorized to find for defendants. We think this fully covered the question of

the vendor's knowledge of the falsity of the representations and the object in making them. [McBeth v. Craddock, 28 Mo. App. 380, l. c. 394; Bank of Atchison County v. Byers, 139 Mo. 627.] Under the circumstances above disclosed, if one knowingly makes a fraudulent representation which is acted upon to another's damage, the intent to defraud is included in and is shown by his acts which, according to the old proverb, "speak louder than words." In such cases the intent to deceive is involved as a matter of law. [Goodwin v. Fall, 102 Me. 353; Porter v. Beattie, 88 Wis. 22; Becker v. Colonial Life Ins. Co., 138 N. Y. Supp. 491.]

The jury having found for the vendees the verdict must be accepted. Consequently, the judgment is affirmed. All concur.

HARRY P. BALDWIN and NELLIE F. BALDWIN,
Respondents, v. FORD J. HARVEY and R. J.
DUNHAM, Receivers of the METROPOLITAN
STREET RAILWAY COMPANY, Appellants.

Kansas City Court of Appeals, June 14, 1915.

1. **NEGLIGENCE: Street Railways: Death.** The plaintiffs sued the defendants for the negligent death of their child. The plaintiffs claimed that the child, nineteen months old, went in front of a standing street car, and the servants of defendants negligently ran over the child. *Held*, that the plaintiffs were entitled to recover.
2. **INSTRUCTIONS: Measure of Damages.** An instruction, which told the jury that in the event they found for plaintiffs they would assess their damages in a sum not less than two thousand and not more than ten thousand in the discretion of the jury taking into consideration all the facts and circumstances in evidence in the case, is not erroneous. And the omission of explanatory features was mere nondirection and not misdirection and is not reversible error, especially when the records clearly show that the appellants were in no way prejudiced thereby.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

AFFIRMED.

John H. Lucas for appellants.

Atwood & Hill for respondents.

TRIMBLE, J.—Respondents brought suit for the death of their little son, Harry P. Baldwin, Jr., nineteen months of age, who was run over and killed by one of the cars belonging to the Metropolitan Street Railway Company and being operated by its Receivers.

The charge in the petition is that, while the car was standing still, the child got on the track a few feet in front of it, and in plain view of those in charge of the car, and that while the child was thus on the track the car was negligently started and caused to run over and kill it.

The evidence in plaintiffs' behalf as to the manner of the child's death consisted of the testimony of the child's grandfather, the child's grandmother, and a neighbor lady who was sitting on her porch near by. Their testimony is to the effect that the car had stopped to discharge passengers; that, while it was standing still, the baby got on the track a few feet in front of the car and then the car started up and struck him with the fender and knocked him down and run over him and stopped just as the rear wheels reached his leg.

The appellants contended that the child did not get in front of the car but toddled on to the track at the side of the car as it passed and that only the rear wheels struck the child. They introduced evidence of several witnesses in support of this contention. Davis, on his porch two hundred and fifty feet away,

says the child was out in the street about three feet from the curb and south of the track when the car started and the child went north to the tracks but passed out of his vision before it was struck. Daley, who was waiting for a car a block west, says no child was in front of the car when it started. Cordier, in an automobile about fifty feet behind the car, saw the child on the south track going diagonally northeast as the car started, but it passed out of his vision before it was killed. Three passengers on the car testified they saw the child near the south side of the track about even with or a little in front of the car after it started and, though they did not see the child struck, they felt a little jar of the rear trucks. There were two children out in the street at the time and there is room for the claim that some of these witnesses saw the other child that was not hurt and confused it with the one that was killed. The grandfather was running toward the child and looking directly at it when it got on the track as were also its grandmother and the neighbor lady Mrs. Hamilton. They were the only eye-witnesses to the striking of the child. The motorman says no child was on the track at the time he started the car. However, a passenger, who got off the car with his wife and baby, says that when the car started up, the motorman was not looking in front of him but at the witness' wife who was out to one side, she having just alighted from the front end of the car. The conductor testified he examined the car at the barn and found no blood on the front wheels but did find it on the rear wheels.

In this state of the testimony, of course, the question of whether the child was in front of the car when it was standing still and was killed by the car being started up without the motorman looking, or whether the child ran into the car from the side and was killed, was for the jury to determine. It returned a verdict for \$2500.

Appellants insist that the case should be treated in this court as one brought under sections 5426 and 5427 instead of 5425, Revised Statutes 1909. We think it is manifest, however, that both parties treated this case in the trial as one under section 5425. This is shown by an instruction asked by respondent and also by an instruction asked by appellant. In *Harding v. Missouri Pacific Railway Co.*, 248 Mo. 663, l. c. 670, the Supreme Court held that, if the case had been brought under sections 5426-7, error, in giving in plaintiff's behalf an instruction good only under section 5425, was invited by defendant asking an instruction, which was refused, that was applicable only to 5425. So that if plaintiff's instruction is erroneous merely because it is applicable to 5425 instead of to 5426, then that error cannot be taken advantage of since it was invited by appellants. But the requesting of these instructions by both sides of the case show that they considered and tried the case as one under section 5425. And there is nothing in the pleadings or evidence to contradict that view.

But granting that the case is under section 5425, the question then arises, is respondent's instruction on the measure of damages erroneous when applied to that section? It told the jury that in the event they found for plaintiff they would assess the damages in a sum not less than two thousand and not more than ten thousand dollars, in the discretion of the jury, "taking into consideration all the facts and circumstances in evidence in the case." There is no doubt but that the instruction is good as far as it went. But should it have gone further and told the jury that in determining the amount they would allow they could take into consideration the pecuniary loss to the parents of the value of the child's life during minority and the expense of burial, less the reasonable cost of keeping and rearing the child during minority, and that the jury could not allow anything by way of *solatium* to the parents'

feelings or for benefits accruing to them after the child reached maturity? As to the compensatory features of the recovery, doubtless it would have been well for the instruction to have contained these directions. The instruction would thereby have been more explicit. But since the instruction was good as far as it went, it would seem that the omission of these explanatory features was mere *non-direction* and not *mis-direction*. And if appellants had desired more explicit direction and limitations upon the amount which the jury would allow as *compensation*, they could easily have asked an instruction embodying these features. They did not do this but chose to ask an instruction forbidding any recovery beyond the *purely penal* features of the statute, namely \$2000. In the case, above cited, of *Harding v. Missouri Pacific R. Co.*, 248 Mo. 663, the instruction for plaintiff told the jury they could "return a verdict in favor of the plaintiff for not less than two thousand dollars, nor more than ten thousand dollars, in the discretion of the jury," and the court on page 670, in speaking of this instruction, said "the measure of damages specified in that section (5425) was properly stated in the instruction."

But, however this may be, we do not think the case should be remanded for another trial for the reason that, even if the instruction is not as explicit as should have been, the record clearly shows that the appellants were in no way prejudiced thereby. The verdict was for \$2500. Of this amount \$2000 is allowed by the statute on the *purely penal* basis. This left only \$500 to be regarded as *compensatory* damages. The evidence was that it cost the parents \$90 to bury the child. This left only \$410 for the pecuniary loss to the parents of the child's services during his minority. The evidence was that he was a well-developed, healthy child. It would seem that \$410 would be a very conservative sum to allow the parents for the net value of the services of the child until he became twenty-one

years old. This fact shows clearly that the jury did not allow anything by way of *solatium* to the parents' feelings, nor for anything beyond the net value of the services during minority, and hence, the jury were not misled to appellants' injury by the failure of respondent's instruction to more clearly specify and limit the elements of recovery. This is the case even on the theory that nothing above the \$2000 is allowable by way of penalty. It leaves out of view entirely any sum allowed as penalty above the \$2000, if the statute has penal features above that sum, owing to the nature and character of the acts causing the injury. If the statute means that the jury may, on this account, award, *as penalty*, a sum above \$2000, then the above analysis of the verdict takes no account of that, and the absence of prejudice to the appellants on account of the instruction is made still more apparent. For, if the motorman did start the car while looking at something else instead of ahead of him as he should have done when driving a dangerous agency over a traveled street in a populous community, he was guilty of such gross negligence as to warrant a jury in placing the *penalty above \$2000 if the statute, when properly construed, allows that*. But, as we have seen, the verdict can be said to clearly rest solely on compensatory features above the \$2000, and takes no notice of any penal features over that amount even if that were allowable. We cannot see, therefore, wherein appellants can claim they were harmed by the instructions. Section 2082, Revised Statutes 1909, forbids the reversal of the judgment of any court unless error was committed materially affecting the merits. Under all the circumstances we think the mere failure of the instruction to specify the elements the jury could consider in exercising their discretion did not constitute reversible error.

We do not agree with the view that there was no evidence upon which the jury could base a finding of

Marolf v. Marolf.

compensatory damages. The burial expenses were in evidence and so also was the age, sex and health of the child. In cases like this, the net value of the child's services during minority are not susceptible of exact proof, but the law, as well as the express direction of the statute, leaves it to the good sense, observation and experience of the jury guided by the facts and circumstances. What the services of the child would be, if it had lived, no one can tell. But the law allows the jury to presume that the child will be dutiful and obedient, and from that to figure what the services *ought* to be worth. [Brunke v. Missouri and Kansas Telephone Co., 112 Mo. App. 623, l. c. 628; Nagel v. Missouri Pacific R. Co., 75 Mo. 653, l. c. 665; Stotler v. Chicago and Alton Ry. Co., 200 Mo. 107, l. c. 142.]

The instruction asked by appellants was, therefore, properly refused since it did not permit a recovery beyond the \$2000. In other words, it did not allow any recovery for compensatory features.

Believing that no reversible error appears in the record, the judgment is affirmed. All concur.

IDA MAROLF, Appellant, v. HENRY P. MAROLF,
Respondent.

Kansas City Court of Appeals, June 14, 1915.

DIVORCE: Pleading: Vagrancy. In an action for divorce, where the plaintiff pleads vagrancy and other indignities, it is not necessary to plead the exact language of the statute. And when the evidence shows that the defendant is clearly a vagrant within the meaning of the statute she is entitled to divorce.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird*, Judge.

REVERSED AND REMANDED (*with directions*).

McCune, Harding, Brown & Murphy for appellant.

No brief for respondent.

TRIMBLE, J.—This is a suit for divorce brought by the wife. There was personal services upon the husband but no appearance by him in the case or testimony offered in his behalf. The trial court found that plaintiff is a good, moral woman and that “her conduct is high class” but nevertheless dismissed her petition, and the wife appealed.

The petition apparently attempted to state two grounds of divorce, first that the husband was a vagrant within the meaning of the law, and second, that he was guilty of such indignities as to render her condition intolerable. This last ground, however, was not well pleaded though if the indignities had themselves been set out so that the court could see whether they were indignities or not, and they had been alleged to be such as rendered her condition intolerable, said last ground would have been well pleaded. But, as to the first ground, we think the petition was sufficient to charge vagrancy on the part of the husband. It did not copy the words of the statute, it is true, but it pleaded all the facts necessary to show the husband to be a vagrant within the meaning of the law, and consequently, we hold that the first ground above mentioned was well pleaded. It was, therefore, sufficient to support a judgment for divorce. Consequently, if the evidence disclosed that plaintiff, under the law, was entitled to a divorce, it was error to refuse it. [Ulrey v. Ulrey, 80 Mo. App. 48; Wares v. Wares, 122 Mo. 129; Wald v. Wald, 119 Mo. App. 341.] From the remarks made by the court in dismissing the case we do not understand that it was dismissed because of any supposed deficiency in the petition but for other reasons. However, since the plaintiff was refused a judgment for divorce, it is necessary for us to see that

the petition states a cause of action before disagreeing with the trial judge as to the propriety of dismissing the bill. This is our reason for holding affirmatively that the petition states a cause of action and is, therefore, sufficient to support a judgment in plaintiff's favor.

Section 2370, Revised Statutes 1909, authorizes a divorce to be granted a wife "when the husband shall be guilty of such conduct as to constitute him a vagrant within the meaning of the law respecting vagrants." Section 4789, Revised Statutes 1909, says: "Every able bodied married man who shall neglect or refuse to provide for the support of his family" shall be deemed a vagrant. In other words, section 2370 gives a wife the right to a divorce when she has a vagabond husband within the meaning of the law, and section 4789 defines what a vagabond husband is. If the proof shows that the husband in this case comes within the above definition, then plaintiff is entitled to a divorce. [Gallemore v. Gallemore, 115 Mo. App. 179.]

The proof undoubtedly shows that the husband was an able bodied man and that he neglected and refused to provide for the support of his family; that after the parties married they went to live with the wife's parents; that the wife's father gave her \$3500 with which to buy a home which was purchased but taken by the husband in his own name; that afterward, because of complaints and dissatisfaction on the part of the husband, the father, upon the husband's deeding the property to him, paid him the relatively small amount the husband had put into the property; that the married couple had lived at the wife's parents' home ever since the marriage, the husband contributing nothing to his wife's support and paying no board and furnishing nothing in the way of either food, clothing or shelter for his family consisting of himself, his

wife and little son. The evidence further showed that, at the institution of the suit, they had been married nearly four years and during that time defendant had taught a term of school at Holden, another short one at Lone Star and was, at the time of the trial, teaching about seven miles from Kansas City; that at other times he "did nothing except to lay around" and would not work in the summer months "because they did not pay very much wages" and would not work for \$2.50 per day; and that he told his wife he did not marry her to support her, when she asked him to do so. There is also evidence of acts that constituted indignities but, as we hold the petition did not properly plead that ground, they need not be mentioned.

The evidence of plaintiff was fully corroborated by other testimony and no testimony was offered to contradict any evidence offered in support of plaintiff's petition. Under these circumstances, the court was not justified in refusing a divorce. As stated, the court expressly found that she was a good woman and that her conduct was first class. We do not think that, because the plaintiff very frankly told the court, in answer to questions which the court himself asked, that she had become convinced her husband wouldn't do anything for her, and that she could not live with him on account of his conduct, and therefore, she would not go to him even if he would send her a ticket and ask her to come to him, this disclosed such an attitude on her part as to deprive her of relief. There was no evidence that the husband had asked her to come or that he would ever do so. In fact, the evidence was all the other way, as were also the inferences to be drawn from his own conduct in not appearing at the trial, of which he was fully cognizant.

The judgment is, therefore, reversed and the cause is remanded with directions to render judgment for

Belch v. Roberts.

plaintiff divorcing her from the bonds of matrimony contracted with defendant and awarding her the care and custody of the infant son mentioned in the petition. The other judges concur.

IDIE M. BELCH, Respondent, v. NANCY M. ROBERTS, Executrix of the Estate of J. S. ROBERTS, deceased, Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **PROBATE COURTS: Bills and Notes: Claims.** The plaintiff presented a demand against the defendant estate on a promissory note which was executed by Young and his wife to the deceased defendant and endorsed by the deceased defendant to plaintiff. *Held*, that presentment for payment is not required in order to charge an endorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.
2. ———: ———: **Indorser.** When an endorser promises to pay a note with full knowledge of the facts, he is deemed to have waived the requirement of presentment for payment and notice.
3. **EVIDENCE: Death of One Party to Contract.** It is not error to allow one party to a contract to testify, when the other party is dead, in the trial of a case in the circuit court, since she was allowed to testify in the trial in the probate court, without objection. The right to object to such testimony is deemed to have been waived.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*, Judge.

AFFIRMED AND REMANDED (*with directions*).

Pope & Lohman for appellant.

A. T. Dumm for respondent.

TRIMBLE, J.—This case arose in the probate court upon a demand presented against the estate of Josephus Roberts, deceased, based upon a negotiable promissory note due one day after date signed by Edward Young and wife, payable to the order of Josephus Roberts and by him endorsed to respondent. The probate court heard the evidence and allowed the claim putting it in the sixth class of demands. The estate appealed to the circuit court where the case was tried *de novo* before a jury which returned a verdict against the estate and it appealed to this court.

At the close of plaintiff's evidence the defendant demurred, and, being overruled, stood on the demurrer. Appellant's main contentions are that the demurrer should have been sustained and that the court erroneously overruled the objection to the competency of one of plaintiff's witnesses.

The evidence shows that plaintiff was the owner and holder of the note sued on; that the money represented by the note was hers and was furnished by her; that Roberts, desiring to sell a lot to Young, procured the loan from plaintiff. Young had no property and his note was worthless, so Roberts had Young to execute the note to him and he immediately endorsed it to plaintiff. The evidence is clear that the transaction was procured and arranged by Roberts and that the note was made for his accommodation. It is also clear that Roberts had no reason to expect that it would be paid if presented for payment. In fact the evidence shows that he knew it would not be paid and agreed that he would take care of the note and be responsible for it, and that he fully understood when the note was executed that he was the one to whom the plaintiff looked for payment and not Young. Section 10050, Revised Statutes 1909, of the Negotiable Instruments Act provides that "presentment for payment is not required in order to charge an endorser where the instrument was made or accepted for his accommodation

and he has no reason to expect that the instrument will be paid if presented."

In addition to this the evidence clearly shows that even if the note had been executed under circumstances which required presentment for payment and notice to the endorser, still Roberts expressly waived such requirement, and promised to pay it, with full knowledge of the facts. This took away any defense on the ground of want of presentment and notice. [Workingmen's Banking Co. v. Blell, 57 Mo. App. 410; Laumeier v. Halleck, 103 Mo. App. 116; Brittain v. Murphy, 118 Mo. App. 235; Bauermeister v. Kuntz, 53 Fla. 340; Sec. 10,079, R. S. 1909.]

The plaintiff was introduced as a witness, but the objection was made that she was incompetent to testify since the other party to the contract or cause of action was dead. Thereupon it was shown by uncontradicted evidence that in the trial of the case in the probate court the plaintiff testified and that her incompetency was waived because no objection was made at that time. When this was shown, the court overruled the objection and allowed her to testify. There was no error in so doing. [Imboden v. St. Louis Union Trust Co., 111 Mo. App. 220; Tomlinson v. Ellison, 104 Mo. 105, l. c. 114; Ess v. Griffith, 139 Mo. 322, l. c. 329; Rice v. Waddill, 168 Mo. 99, l. c. 119; Jones v. Prudential Ins. Co., 173 Mo. App. 1.]

It is finally claimed that the judgment is erroneous because it awards execution against the administratrix. This is no ground for the granting of a new trial. It is true no execution can be issued. The only way the judgment can be enforced is by filing the same in the probate court for classification and allowance as a demand against the estate, as provided for in section 2168, Revised Statutes 1909. But no execution has been issued and none will be. The statute does not invalidate the judgment. It merely provides that no execution shall issue thereon. The judgment as establish-

ing a demand against the estate should be affirmed. But, although it may not be necessary, the cause will be remanded with directions to modify the judgment so as to eliminate the award of execution and directing the filing of a certified copy of the judgment in the probate court for classification and allowance against said estate. It is so ordered. All concur.

JAMES F. COCKRELL, Appellant, v. C. M.
WILLIAMS, Respondent.

Kansas City Court of Appeals, June 14, 1915.

1. **BILLS AND NOTES: Signature by More Than One.** A note reading that "I, John Smith promise to pay to," etc., and signed by Smith and another is the note of both.
2. **AGENT: "Agt.": Abbreviation.** The letters "Agt." appended to a signature are understood commercially to be an abbreviation for the word "Agent."
3. **———: Individual: Signature.** A contract agreeing that "the company" (a private corporation), would pay \$1000 and signed by the company and another, who appended "Agt." to his name is the obligation of both.
4. **———: Contract: Individual: Evidence Aliunde.** Where one signs his name to a note or contract with the letters "Agt." added to his name, he is prima facie, bound individually; but he may show that he was only an agent and not bound as an individual. Authorities discussed.
5. **CONTRACT: Joint Action.** A maker and guarantor of a contract can be sued jointly.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

REVERSED AND REMANDED.

M. E. Lawson and *Fyke & Snider* for appellant.

Battle McCardle for respondent.

ELLISON, P. J.—This action was instituted against The Kansas City Terra Cotta Company and defendants A. F. Brooker and C. M. Williams, as signers of a contract for the payment of \$1000. To Williams' signature there was added the letters "Agt." The case was dismissed as to the Terra Cotta Company, defendant Brooker made default and judgment was rendered in favor of Williams on the pleadings, on the ground that no cause of action was stated. The answer was a general denial. The petition set out the contract in these words: "Received of James F. Cockrell, one thousand (\$1000) dollars in payment for Certificate No. 82, for ten shares of the stock of the Kansas City Terra Cotta Company, upon the express condition that if at the end of six months from the date hereof, said James F. Cockrell shall require the refund of said one thousand (\$1000) dollars, upon his surrender of said certificate for said stock, the above company shall forthwith refund said one thousand (\$1000) dollars upon the surrender of said certificate as aforesaid, and do hereby guarantee him six per cent on his one thousand dollars for the said six months. The Kansas City Terra Cotta Company, By A. F. Brooker, President, A. F. Brooker, C. M. Williams, Agt."

The petition also contained this allegation: "That at said date and in signing said writing said Williams was acting in his capacity as an individual, and not as agent of said corporation, and at such time was not agent of said corporation, and had no authority to act as such agent."

The particular point against the petition was made in an objection to receiving any evidence; and that objection was based on the ground that it appeared upon the face of the contract, as set out in the petition, that it was not signed by Williams so as to bind him individually.

Before entering upon the case, it is perhaps well to suggest that in considering the authorities on the question involved, here, they should not be confused with that class which generally exonerate the agent when acting for *public* institutions, such as the government, counties, cities, School Districts, etc. [Story on Agency, secs. 302-306; 1 Mechem on Agency, sec. 1428; McGee v. Larramore, 50 Mo. 425; School Town v. Kendall, 72 Ind. 91; McClellan v. Reynolds, 49 Mo. 312.]

It will be observed that the contract recites that in certain contingency the Terra Cotta Company will pay one thousand dollars. It will be further observed that after the proper signature of the company, there follows the name, A. F. Brooker, and then C. M. Williams, Agt. We can make our views clearer by dropping consideration of Brooker, as he is not defending, and for a moment omitting consideration of the abbreviation "Agt." added after Williams' name. If the contract were a note, and for purposes of our consideration it is like a non-negotiable note, the fact that it reads that the company will pay one thousand dollars does not prevent its being held to mean also that William would pay it, either as maker or guarantor, depending, perhaps, on intention. If a straight non-negotiable note reads "I, John Smith promise to pay to" etc., and is signed by John Smith and another, it is the note of both. [1 Daniels Neg. Instruments, sec. 94; Story on Promissory Notes, sec. 57.] Even when a note, though non-negotiable, is signed on the back by an apparent stranger, he is held to have signed as a maker. [Powell v. Thomas, 7 Mo. 440; Lewis v. Harvey, 18 Mo. 74.] Perhaps, as suggested in the last case, with a right to show that he was an endorser or guarantor.

Considering the case as it is, with the appendix to Williams' name, we think the letters "Agt" are,

plainly enough, an abbreviation for the word "Agent." In *Barclay v. Persly*, 110 Pa. St. 13, it was held the letters, "Fr." appended to a signature, were "meaningless hieroglyphics;" but we think that could not be said of the letters in this case. They are a well-recognized commercial abbreviation.

So what office can those letters, or the word, "Agent," have? Williams evidently did not sign the name of the company through himself as agent; for the company's name was properly signed by its president. Neither so far as the petition shows, could he have signed his name as agent in the sense that it was the company's obligation, for the company's obligation was made out by its signature through the hand of its president. Yet we must assume that a name signed to a contract has some purpose. In many jurisdictions it would be held that Williams' signature could have only one purpose and that, his personal obligation; and that parol evidence could not be heard to show the contrary. Otherwise, it is, in effect, said that signing his name is a wasted effort. [*Heffner v. Brownell*, 75 Iowa, 341; *McCandless v. Belle Plaine C. Co.*, 78 Iowa, 341; *Davis v. England*, 141 Mass. 587; *Scott v. Baker*, 3 West Va. 285; *Gavazza v. Plummer*, 53 Wash. 14; *Phillips v. Knight*, 20 R. I. 624; *Burbank v. Posey*, 70 Ky. 372; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441.]

On the other hand, a great number of the courts announce the rule that adding an official or a representative capacity to the signature, makes an ambiguity which may be explained. We think our own Supreme Court has adopted the latter rule. [*Smith v. Alexander*, 31 Mo. 193; *Musser v. Johnson*, 42 Mo. 74; *Klosterman v. Loos*, 58 Mo. 290; *Hartzell v. Crumb*, 90 Mo. 629, 640.]

In *Peterson v. Homan*, 44 Minn. 166, it is held "that where the words 'agent,' 'trustee,' or the like

are affixed to the name of a party to a contract, which may be either descriptive of the person or indicative of the character in which he contracts, they are prima facie descriptive only, but it may be shown by extrinsic evidence that they were understood as determining the character in which he contracted. . . . In other words, in order to show that he contracted in a representative capacity he must first prove the existence of that capacity. The reason for that is apparent. The evidence is admitted, not to defeat the contract, but to show who is liable upon it—whose contract it is.” And such is the view expressed in the following cases: *Metcalf v. Williams*, 104 U. S. 93, 96; *Braun v. Hess*, 187 Ill. 283, 286; *Brockway v. Allen*, 17 Wend. 40; *Kean v. Davis*, 21 N. J. L. 683; *Taylor v. Reger*, 18 Ind. App. 466, 48 N. E. 262.]

Of course there are cases where the intention, as shown by the entire contract, is too plain for evidence *aliunde*. But this is not one of them. Restating what we have written above, we find in the body of the contract a promise that the “company” will “refund said one thousand dollars,” and that the contract is duly signed by the company. Then, after this formal signature, comes the name of “C. M. Williams Agt.” The petition alleges that the letters thus appended to his name, were not intended to affect his liability as an individual. We need not say whether that was not a matter of defense, unnecessary to set up in the petition, and properly belonging to the answer; but be that as it may, undoubtedly a cause of action was stated.

It is suggested by defendant that if there is any liability on his part it is that of a guarantor and that, as such, he could not be sued jointly with the maker, citing *Ringo v. Graham*, 67 Mo. 324. We discussed that question at length in two opinions at this term: *Roark v. Ideal Epworth Acetylene Co.*; *Write Away Pen Co.*

Commercial State Bank v. Ankrum.

v. Buckner, and ruled that such an action could be brought jointly.

The judgment is reversed and the cause remanded. All concur.

COMMERCIAL STATE BANK, Respondent, v.
WILLIAM ANKRUM et al., Appellants.

Kansas City Court of Appeals, June 14, 1915.

1. **ATTACHMENTS: Creditors: General, Judgment and Attachment Creditors: Fraudulent Conveyance: Pleading.** A general creditor cannot, but a judgment or attachment creditor can, attack a fraudulent conveyance of his debtor's property. But the petition in an action to set aside such conveyance which does not allege that such creditor is a judgment or attachment creditor does not state a cause of action.
2. **PLEADING: Receiver: Cause of Action.** Where a receiver is appointed in an action to set aside a conveyance of real estate for fraud and it appears that no cause of action is stated in the petition, the order appointing the receiver should be vacated.

Appeal from Harrison Circuit Court.—*Hon. Geo. W. Wanamaker*, Judge.

REVERSED.

Stubbs & Stubbs for appellant.

Frisby & Frisby for respondent.

ELLISON, P. J.—Plaintiff brought an action against defendant, Williams, on a note, by attachment. While that was pending he brought an action against defendants to set aside deeds made by defendant William Ankrum to his son-in-law and by the latter to Ankrum's wife, on the ground that they were voluntary and made to defraud Ankrum's creditors. The present

controversy grew out of the latter action. Before the case was tried on the merits, plaintiff made application for the appointment of a receiver. The appointment was made and defendants then moved to vacate the order. This was overruled and defendants appealed to this court.

Generally a common creditor cannot attack a conveyance of his debtor in an independent action to set it aside for fraud. He should first have his claim ascertained and vouched by a judgment. [Martin v. Mitchell, 23 Mo. 50; Crim v. Walker, 79 Mo. 335; High on Receivers (2 Ed.), sec. 406.] But an attachment creditor's rights are greater. In that instance there is a seizure of the land and a lien is fastened upon it and, by authority of the statute, such creditor may maintain the action before judgment. [Sec. 2344, R. S. 1909; M. & T. Imp. Co. v. Jones, 143 Mo. 253; Boland v. Ross, 120 Mo. 208.]

But in the instance of either a judgment creditor or an attachment creditor, the petition should allege that the plaintiff is one or the other. Otherwise it fails to state an essential requisite to a cause of action. In this case it appears from the petition that plaintiff was a creditor, but there is no allegation whatever that it was an attachment creditor.

It is plain that if there is no cause of action set out in the petition, no ground is laid for a receiver and none should be appointed. [Cantwell v. Columbia Lead Co., 199 Mo. 1, 42.] In that case the Supreme Court said : "This leaves nothing for decision except the single question: Does the petition state a cause of action for equitable relief, and, as incident to that relief, the appointment of a receiver? Its consideration may proceed on the assumption that the petition must state facts sufficient to warrant the appointment of a receiver, or the order appointing one cannot stand."

Plaintiff seemingly urges, as a cure for the deficiency in the petition, that the application for a re-

ceiver alleged that it was an attachment creditor. We need not say whether necessary allegations in the petition can be pieced out by statements in the application for a receiver; for we do not find any allegation of that nature in the latter paper. Neither attachment suit, nor attachment levy is mentioned. The judgment is reversed. All concur.

W. C. TAPSCOTT, Respondent, v. MARVIN TYSON,
Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **NEGLIGENCE: Automobiles: Father and Son.** The question is discussed whether the father owning an automobile for use of himself and his family, is liable for the negligence of his son driving the automobile in escorting a young lady friend from church.
2. ———: ———: **Petition: Damages: Lump Sum: Verdict.** If a petition for damages for negligence in driving an automobile against plaintiff's buggy, asks damages, in a lump sum, for the personal injury and injury to the horse and destruction of the buggy and harness; and, on account of failing to prove the value of the horse, buggy and harness, the court directed that no damages could be allowed for those items, yet the jury returned a verdict for the entire sum claimed, it was *held* that such verdict should be set aside.

Appeal from Jackson Circuit Court.—*Hon. Kimbrough Stone*, Judge.

REVERSED AND REMANDED.

L. T. Dryden and *T. J. Hacksler* for appellant.

E. C. Hamilton and *John F. Thice* for respondent.

ELLISON, P. J.—This is an action for damages alleged to have resulted to the plaintiff by reason of

the negligence of defendant's son in driving the defendant's automobile. The judgment in the trial court was for the plaintiff in the sum of \$2000, being the full amount asked by him in his petition.

It was shown by the evidence in plaintiff's behalf that defendant, a farmer, was the owner of an automobile, which he kept for the use of himself and family. That his minor son, nineteen years of age, was a member of the family and drove the machine for himself, and also generally did so when any of the family were using it. A young lady acquaintance of the family lived in the same neighborhood and the son frequently escorted her to places in the neighborhood. On the day in question, the son had an engagement with the young lady to take her to church. The arrangement being that he would drive the machine over after her, come back by his home, take in his father and mother and other members of the family and all go to church together. On returning from church, when they got near home, the family got out and walked to the house, while the son proceeded with the young lady to her home. At this time plaintiff, a young unmarried man, and a young lady friend, were a distance up the road, in a one horse buggy, driving in the opposite direction. They saw the machine approaching, and turned out to the side of an embankment and stopped, the young man calling out to stop the machine. But, it seems he was not heard, or, at least, not heeded and the machine ran against a wheel of the buggy, the horse became frightened, the buggy was turned over and plaintiff suffered painful injuries. At this point, considerable space in the record is occupied about what was said and done by the parties, the injury to plaintiff, his horse, harness and buggy, etc., which we need not notice further than to say, there was enough evidence to support a finding of negligence on part of defendant's son.

The action is based on the theory that the defendant is liable for the negligence of his son. In *Daily v. Maxwell*, 152 Mo. App. 415, where a minor son asked and obtained the consent of his father to take a party of his young friends out riding in an automobile, the father kept for himself and his family, we held the father liable for the negligence of the son in colliding with a buggy being driven along a street. That case is relied upon by the plaintiff in this case. It has been cited several times in the courts of other States. It is quoted from at length and fully approved by the Supreme Court of Kentucky in *Stowe v. Morris*, 147 Ky. 386. It is doubted in *McNeal v. McKain*, 33 Okla. 449, 455, and strongly condemned by the Supreme Court of Alabama in *Parker v. Wilson*, 179 Ala. 361, 60 So. 150; 43 L. R. A. (N. S.), 87, 90, and, though not cited, the rule announced therein is disapproved in *Reynolds v. Buck*, 127 Iowa, 601, and *Doran v. Thomson*, 76 N. J. L. 754.

The question arose in the Springfield Court of Appeals and the rule announced in *Daily v. Maxwell*, was again discussed. [*Hays v. Hogan*, 180 Mo. App. 237.] On the hearing the court adopted the view of *Daily v. Maxwell*, but on a motion for rehearing, and further consideration, Judge STURGIS thought it to be erroneous and contrary to certain rulings of the Supreme Court concerning the same principle, and the case was thereupon certified to that court and is now pending there for final determination, which will doubtless be had before this case is reached in the trial court to which we have concluded to remand it, on the ground following.

The petition charges injury to plaintiff personally and to his property, the combined damage being two thousand dollars, and the verdict of the jury was for that sum. The allegation is in these words: "That by reason of the carelessness and negligence aforesaid, plaintiff sustained damages as follows: The horse

driven by this plaintiff was seriously cut, bruised and ruined, that the vehicle in which plaintiff was driving was destroyed together with the harness with which said horse was attached to said vehicle and that the clothes of this plaintiff were torn from him, soiled and ruined, and that his watch was broken and ruined. That by reason of said carelessness and negligence plaintiff suffered great physical injuries and lost much time from work; that he has sustained a serious and permanent injury to his right arm and has been caused to suffer much pain and mental anguish by reason of the premises. . . . Wherefore, the premises considered plaintiff prays judgment in actual damages in the sum of two thousand (\$2000) dollars and for his costs in this action expended."

After the evidence was heard, including the injury to the horse and buggy and the destruction of the harness, the trial court ruled that there was no evidence of the value of the property thus injured and destroyed, or of the amount in which it was damaged, and therefore, by an instruction, excluded that part of the damages from the consideration of the jury, yet there was a verdict and judgment for the amount of the claim, including that part of it. Plaintiff's total damages were \$2000, made up in great part, by the severe injury shown to have been inflicted upon the horse, the damage shown to the buggy and the destruction of the harness. By omitting that damage, whatever it was, plaintiff's total originally claimed was necessarily reduced. Yet a verdict and judgment were rendered for the full amount. That is to say, he has been allowed his full claim when only a part of it is proven.

We have been cited to *Burns v. Wilson*, 1 Mo. App. 179, where the full amount claimed was \$1200. Of this sum \$300 was for loss of services, physicians bills, etc. The trial court, by instruction, withdrew that part of the claim, yet the jury allowed the full amount and

Koslosky v. Bloch.

the judgment was therefore reversed. The only difference in that case and this is, that there the sum unproven was named, while here it is not. But it is just as specifically alleged and proven to be a part of the claim, as if a specific amount had been named.

The judgment is reversed and the cause remanded.
All concur.

LOUIS KOSLOSKY, et al., Respondents, v. LEON BLOCH, Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **CONTRACTS: Substitution: Consideration.** When a later contract is substituted for an earlier one the withdrawal of the first and substitution of the second are themselves a consideration.
2. ———: ———: **In Part.** Where one is already legally bound by his contract to perform a certain service a later contract involving only one item of the first contract is not a substitution of one contract for another.
3. ———: **Party Bound: Additional Contract: Consideration.** Where one is already legally bound by his contract to perform a certain service, a later contract agreeing to pay him a larger compensation for that service is without consideration.
4. ———: **Tender: Admission.** A tender of a sum to the opposing party and depositing it in court is an admission that it is due that party.
5. ———: **Tender: Requisite to Bringing Injunction: Judgment.** Where a beneficiary is proceeding to foreclose his deed of trust on the debtor's property and the latter believing the debt to have been paid brings an injunction to prevent the sale, it is not necessary, as a requisite to his right to bring the action, that he should tender any sum, although the court finds that he still owes a balance. It is sufficient to authorize a judgment granting the injunction if he tenders the amount found by the court and deposits it in court.

191M.A.17

6. ———: ———: Costs. Although it is not necessary to make a tender to one who is proceeding to foreclose a deed of trust, before bringing an injunction against him, to prevent the sale, and although the court finds a balance is due the holder of the deed and the debtor then tenders it and pays it into court and the latter sustains the injunction, yet the holder of the deed of trust is entitled to a judgment for the costs.

Appeal from Jackson Circuit Court.—*Hon. Thos. J. Seehorn*, Judge.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

H. H. McCluer and *Chas. A. Loomis* for appellant.

Ben R. Estill for respondents.

ELLISON, P. J.—Defendant Bloch held a deed of trust given to a trustee to secure a debt of \$625 due to Bloch from plaintiffs. Bloch was proceeding to foreclose the deed of trust and plaintiffs sued out an injunction, forbidding a foreclosure and asking a cancellation on the ground that the debt had been satisfied. The trial court found there was due Bloch a balance of \$53, which plaintiffs thereupon tendered to him and on his refusal to accept, paid it into court. A decree was then entered for plaintiff and the costs assessed against defendant. Bloch then appealed.

It appears that plaintiffs desired to build some apartment houses on ground owned by them in Kansas City and which was encumbered with a mortgage for \$6500. They were unfortunate with the building, in that while they paid contractors, the latter did not pay for labor and material and the consequence was that various liens were filed against the building and plaintiffs bid fair to lose it and their money, too. In this situation they secured the service of Bloch to do for them the best he could towards relieving them of their difficulties by way of defending, settling and compromising lien claims and obtaining additional loans

with which to complete the building. Their contract with Bloch was in writing, expressing fully and clearly his obligation to perform that service for which they were to pay him \$625. He immediately proceeded with the business. He made an arrangement whereby the mortgage then on the property was cancelled and a new one placed for \$8000 and a second for \$5000. Plaintiffs had paid Bloch \$125 in cash and now gave him a note for \$500 with a third deed of trust (the one now in controversy) to secure it.

Bloch then compromised or settled all the claims against the building except one, known as the Wilson Lumber Company claim for \$862. That company refused to compromise and that sum was left with the agents who had furnished plaintiffs the money and taken the first and second mortgages, so that their principal would be safe in case the Wilson Company maintained its lien. It was then concluded to contest the lien, and it was defeated in court. This defense of the Wilson Company claim was made the excuse or basis for another contract which Bloch signed shortly, perhaps a month, after the first one, in which they agreed to pay Bloch one-half of the Wilson Company claim if he defeated the case *in toto*, or one-half of whatever he reduced it. The contract further authorized Bloch "to appoint such other attorney, or attorneys, as may be necessary, or as he may deem proper."

This case turns on the legal force of the last contract; for it was shown that various payments were made to Bloch which he testified he applied to the payment of what he claims was due him under the last contract, whereas plaintiff insists they owed nothing on that contract and that the payments were made on what was owing him on the first contract. The ground of plaintiff's contention that the last contract had no legal force is, that it was wholly without consideration, for the reason that it was an agreement to pay him again for what he was already obliged to do

by the first contract. On the other hand, Bloch claims it is valid as being a substitution for the first contract, and that in substituted contracts, the substitution itself is a consideration; and that is the law. [Carman v. Harrah, 182 Mo. App. 365, 376; Smith v. Crane, 169 Mo. App. 695; Pottery Co. v. Folckner, 131 Mo. App. 105; Pressed Brick Co. v. Burr, 76 Mo. App. 380; Cannon Co. v. Boswell, 117 Mo. App. 473.]

But, it only requires a glance at the two contracts to see that the agreement in the second—the defense of the Wilson lumber company claim—was precisely what he agreed to do in the first. In the first, it is recited that “whereas suits to enforce mechanics liens have been instituted by claimants. . . . Now, therefore, inasmuch as it is necessary for said Koslosky to employ an attorney to accomplish the following results: To properly defend said lien suits: to settle and compromise claims for labor and material, by securing discounts and otherwise. . . . To secure a loan or loans, . . . Now it is agreed, that Louis and Sarah Koslosky hereby employ Leon E. Bloch, as their attorney, to do and perform the services and accomplish the results above specified, and he agrees to perform said services and accomplish the results stated, for the aggregate sum of six hundred and twenty-five dollars, which Louis and Sarah Koslosky agree to pay him for said services in the following manner—\$125, February 20, \$100 when building is completed, ready for occupancy and all expenses paid, and \$400 when suits and liens are all settled and property released,” etc.

The second contract was by no means a substitution for the first. It was merely an attempt to fix an additional charge for performing one of the parts named in the first contract which he had specifically agreed he would perform for a price specified in that contract. It was palpably *nudum pactum*. [Lingerfelder v. Wainright, 103 Mo. 578; Lappin v. Crawford,

186 Mo. 462, 471; Wear Bros. v. Schmelzer, 92 Mo. App. 314, 323; Hilt v. Hammond, 179 Mo. App. 406; Koerper v. Royal Inv. Co., 102 Mo. App. 543; Storck v. Mosker, 55 Mo. App. 26; Orr v. Sanford, 74 Mo. App. 187.]

There is one part of the second contract which authorized Bloch to employ another attorney to assist him in the Wilson Lumber Company lien, which the trial court seems to have allowed to stand on the ground that Bloch had made the employment under such authority. That phase of the case was in Bloch's favor and against plaintiffs who are not appealing; and hence it is not before us for decision.

Notwithstanding the trial court found against the validity of the second contract in its provision for a second fee for Bloch's services, it nevertheless found that there was a balance of \$53 due him under the first contract. Plaintiffs, by making a tender of that sum and depositing it in court, admitted it was due. [Johnson v. Garlichs, 63 Mo. App. 578, and authorities there cited.] And therefore Bloch had the right to proceed with the foreclosure of his deed of trust up to the date of the tender. The matter of tender is thus made a second feature of the case, and that, in fact, only affects the costs. For, in our view of the evidence, under the law applied by the trial court, and we think properly, Bloch is faring well to be allowed the \$53 balance found by the court, and the only question about the propriety of the judgment, is whether plaintiffs should have tendered the costs. Since the tender is a concession that a balance was owing to Bloch, ordinarily plaintiffs if they knew it was due, should have paid or tendered that sum before filing the bill for injunction. Realizing this, plaintiffs seek to avoid the effect of it, by invoking that rule of law which permits dispensing with a tender when it is apparent it would be a useless and vain thing to do. Bloch goes

farther and seems to take the position that a tender was a necessary prerequisite to the filing of the bill.

We are of the opinion that neither of these rules of law are applicable to the legal nature of the case and the facts. The action being in equity for injunction to restrain a sale of land for debt, and to cancel the debt, naturally included an adjustment or accounting between the parties, in reference to payments. The fact that plaintiffs mistakenly believed the whole debt was paid, ought not to bar a prosecution of the action if it turned out on trial, that something was still due. It would be unreasonable to turn them out of court for such mistake and require them to make a tender and begin over again. It was enough that they made the tender in court as soon as the amount was ascertained. They were not required to make the tender as a prerequisite to bringing their bill. [Barnard v. Cushman, 35 Ill. 451, 454; Nye v. Swan, 49 Minn. 431, 437; Loell v. Hadden, 85 Tex. 182, 188.] See, also, in this connection opinions of Judges SHERWOOD and BLACK in Kline v. Vogel, 90 Mo. 239. Having made that tender it is inconsistent now to set up the excuse that they were relieved from a tender by the claimed fact that defendant would not have accepted it. They did right in immediately tendering and depositing into court the amount of balance found to be owing. And the court was right in rendering judgment for plaintiffs, but we think erred in assessing the costs against defendants. [Glos v. McKeown, 141 Ill. 288.]

The judgment will therefore be affirmed except as to the costs as to which it will be reversed and the cause remanded with directions to enter judgment for defendant for the costs. All concur.

**BATTLE McCARDLE, Respondent, v. GEORGE B.
PECK DRY GOODS COMPANY, Appellant.**

Kansas City Court of Appeals, June 14, 1915.

- 1. NEGLIGENCE: Bodily Injury: Fright: Nervousness: Damages.** A large mercantile establishment operated elevators to take customers from floor to floor. A woman entered one on the second floor to descend to the street floor. Through negligent defects in the elevator, it failed to stop and ran rapidly to the basement where it struck violently against the elevator shaft. This frightened and terrified the woman and other passengers, and hurt her bodily, as well. Bodily injury further developed, as well as great nervous derangement. It was *held* that, the bodily injury, anguish of mind and nervous derangement, were all elements of damages in her husband's action for loss of services.
- 2. FRIGHT: Terror: Injury: Jolt: Internal Injury: Damages.** Fright, terror and nervous derangement, accompanied by bodily injury caused by negligence, become elements of damages. And such physical injury may be wholly internal, and it may be caused by a jar or jolt, resulting from the impact of an elevator where it has dropped to the bottom of the shaft.
- 3. ———: Physical Injury: Nervous Injury: Damages.** If a negligent act causes fright and terror, but not bodily injury, there is no liability, though bodily injury should result from the fright. But if the negligence causes physical injury, and fright, there is liability for both; and, in that case, the injuries, physical and nervous, which are caused and followed by the fright, also are elements of damage.

**Appeal from Jackson Circuit Court.—Hon. Jos. A.
Guthrie, Judge.**

AFFIRMED (conditionally).

McCune, Harding, Brown & Murphy and *R. B. Caldwell* for appellant.

Boyle & Howell for respondent.

ELLISON, P. J.—Plaintiff's action is based on loss of services of his wife, occasioned by injuries he alleges she received through the negligence of defendant. He recovered judgment in the circuit court.

Defendant is proprietor of a large retail mercantile establishment in Kansas City and operates elevators to carry customers to and from the different floors of the building. It was in one of these elevators that plaintiff claims his wife was injured, by reason of its being allowed to fall to the bottom of the shaft. The evidence is abundant that the elevator in which she entered did not descend properly, either from defects in the structure itself, or some of the apparatus connected with it. On more than one occasion it could not be stopped and had struck the bottom with such force as to break the mirror in the car. Defendant insists that whatever the wife suffered at the time, in addition to ailments with which she was then already afflicted, was caused by fear and fright; and that whatever inconvenience, or bodily derangement she may have suffered since, was the result of nervous fright, unaccompanied by bodily injury at the time, and that for such misfortune, it is not liable. On the other hand, plaintiff contends that the terrifying situation in which his wife was placed and the sudden impact of the elevator with the bottom of the shaft, caused great fright and at the same time inflicted bodily injury, from which continued mental suffering and bodily distress developed. These are the lines of dispute between the parties.

If defendant is right on the facts, the judgment is without legal support and should be reversed. For the law is, that mere fright and mental distress, though caused by negligence, will not support a cause of action. [Connell v. Western Union, 116 Mo. 34; Strange v. Railroad, 61 Mo. App. 586; Crutcher v. Railroad, 132 Mo. App. 311; Dye v. Railroad, 135 Mo. App. 254; Morris v. Railroad, 228 Pa. St. 198; Huston v. Free-

manburg, 212 Pa. St. 548; Ewing v. Railroad, 147 Pa. St. 40; Mitchell v. Railroad, 151 N. Y. 107; Reed v. Ford, 129 Ky. 471; White v. Sander, 168 Mass. 296; Spade v. Railroad, 168 Mass. 285.]

But if, besides fright, the negligent act inflicts physical injury, external or internal, then fright, mental distress or anguish and further resulting bodily ailments, even though attributable to the fright, attach to the original physical injury and the whole may be considered in the allowance of damages. [Porter v. Railroad, 73 N. J. L. 405; Kennell v. Gershonovitz, 84 N. J. L. 577; Shay v. Ry. Co., 66 N. J. L. 334; Conley v. United Drug Co., 218 Mass. 238; Folk v. Railroad, (S. C. 1914), 83 S. E. 452; and authorities hereinafter cited.]

The rule of law, in this respect, may be stated in this way: If the negligent act causes fright and terror, but not bodily injury, there is no liability, though bodily injury should result from the fright. But if the negligence causes physical injury and fright, there is liability for both; and the injuries, physical and nervous, which are caused and followed by the fright, also are elements of damage.

Now to which branch of the law do the facts of the case apply? Plaintiff's wife was on the second floor of the building. She entered the elevator to descend to the street floor; there were others in the elevator. The operator failed to stop at the street floor, but passed it rapidly and struck the bottom of the shaft in the basement below. The language of an eyewitness (an elevator boy) who stood in the basement, at the elevator shaft, was that, "instead of stopping at the first floor, it came on down and hit the bottom with a crash, and I heard a woman scream and a little baby started to crying." Other witnesses, one of them a friend of plaintiff's wife and whom the latter had left on the second floor, heard the screams of women and then the "crash." She knew something

had happened and ran down the stairway to the first floor, crying. The operator left the elevator and the other operator who was standing in the basement at the bottom of the shaft, took charge and ran back to the first floor, when plaintiff's wife got out and met her friend whom she had left a moment before on the second floor. This friend testified that she was white, trembling and could hardly walk." They went into a store next door. The witness said she was "pale and sick and could not go any more." They sat down and she put her hand to her side and frequently to her back. A small discolored place appeared on her body and blood passed with her urine next day; yet there was no evidence that she was thrown against the elevator. For a long time afterwards she was sorely afflicted with physical derangements of different kinds, accompanied with distressing nervous disorder. It is true, as we have above intimated, defendant endeavored to connect her afflictions with similar sickness prior to the accident, perhaps resulting from childbirth; but, the verdict being for plaintiff, we must accept the evidence in his behalf. We think it shows liability.

The defendant offered an instruction which the court modified by adding the words in italics, viz. "You are instructed that the plaintiff cannot recover for any fright, terror, alarm, anxiety or distress of mind suffered or experienced by plaintiff's wife and caused by or resulting from the descent of defendant's elevator, if these were unaccompanied by some physical injury, or *jolting, jarring or shaking of the body of plaintiff's wife*. You are further instructed that if you believe from the evidence that the present condition of plaintiff's wife is the result of a fright or scare only, then plaintiff cannot recover."

The instruction as modified, to be properly understood must be applied to the evidence. As we have already stated, it was shown that after the fall of the elevator, plaintiff's wife was afflicted with different

internal bodily injuries, and the case involved a discussion of bodily injury received from bodily contact with some outside object, as distinguished from an injury to the body resulting from the jolt or jar of the elevator when it struck the bottom of the shaft. As applied to the evidence, the instruction, as modified, merely meant that if plaintiff's wife received physical injuries, from the jolt or jar of her body caused by the fall of the elevator, it afforded plaintiff ground for recovery. And undoubtedly it did afford such ground. [Spade v. Railroad, 168 Mass. 285; Homans v. Boston Elevated Ry., 180 Mass. 456; Cameron v. New Eng. T. & T. Co., 182 Mass. 310; Driscoll v. Gaffey, 207 Mass. 102; Conley v. United Drug Co., 218 Mo. 238.] If the jar or jolt had caused her teeth to have severed her tongue, or if it had displaced some of her internal organs, or have sprained her back, or neck, certainly either of those things would have been bodily injuries, though the body, in one sense, did not come in contact with any outside substance, save the floor of the elevator upon which she stood, and against which her feet naturally were driven by force of the impact with the bottom of the shaft.

After a thorough examination of all the other instructions, we are convinced there is no reversible error to be found in the action of the court. Instruction number 11, given for the plaintiff is not subject to the criticism made by defendant. It does not belong to that class of instructions frequently condemned in the appellate courts, viz., one purporting to cover the whole case and directing a verdict, yet ignoring an issue in defense. It is a proper declaration of the law, which was necessary for the jury to know and, besides, it does not direct a verdict. Taken in connection with other instructions in the case, it was without fault.

Plaintiff's total claim for medicine and medical services, as expressed in his petition was five hundred

dollars. The record before us is in rather awkward shape as to the verdict. But we think it fairly appears that the jury has allowed five hundred and ninety dollars on that part of his claim. This makes the verdict excessive in the sum of ninety dollars. Plaintiff offers to remit that sum and will be permitted to do so. The judgment will then be affirmed, the costs of the appeal being taxed against the plaintiff. All concur.

CHARLES WHITE, Respondent, v. MONTGOMERY
WARD & COMPANY, Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **NEGLIGENCE: Unloading Sugar: Runway: Deputy.** Two parallel car tracks entered defendant's house and a freight car stood on each. One was filled with sugar in sacks which were loaded onto a four-wheeled truck; the truck was then pulled out of the car onto a runway which carried it over to the other car, thence it was pulled through that car onto another runway, carrying it to a dock where it was to be unloaded. The end of the runway was negligently fastened inside the last car by another employee, and as plaintiff attempted to pull the truck through the car onto the runway, it slipped out of position and fell to the ground with plaintiff and the truck whereby he was injured. *Held*, that it was the master's duty to see that the runway was reasonably safe, and though he deputized that duty to another employee, he was liable for the latter's negligence.
2. **———: Master: Deputy: Positive Duty.** A master who deputizes a servant to perform one of his positive duties to other servants, cannot escape liability for the deputy's negligence, no matter how low down in the scale of employment the latter may be.

Appeal from Jackson Circuit Court.—*Hon. Thos. J. Seehorn*, Judge.

AFFIRMED.

Battle McCardle and *F. L. Barry* for appellant.

James B. Peck, F. M. Kennard and Wofford & Kimbrall for respondent.

ELLISON, P. J.—Plaintiff was an employee of defendant and had his leg broken while engaged in unloading sugar from a car. He brought this action for damages and recovered judgment in the circuit court.

Defendant is a large mercantile establishment, engaged in business in a large building, into the lower floor of which spur tracks of a railway are laid, over which cars of merchandise are taken in and out of the building. Plaintiff was a laborer engaged in unloading sacks of sugar from a car. He was under the orders and direction of defendant's foreman in that department. As near as we can understand the situation, the car in which was the sugar was standing on one track; next was what is called a "dock," then a car standing on another track, then another dock on which the sugar was placed. The floors of the cars and the docks were about the same height above the ground and were connected by what are called "runways," perhaps four feet long. The sugar was loaded onto a four-wheel truck brought into the car. When the truck was loaded with a sufficient number of the sacks of sugar, plaintiff would take hold of a "tongue" or handle and pull it over the route to the dock where it was to be placed, being assisted by a man pushing from behind. The ends of these "runways" connecting the docks and the cars, were laid on the floor of the cars, extending into them a few inches. After the truck here involved, was loaded, plaintiff pulled it out of the car over the runway, across the dock, thence over another runway, through the other car, and as he attempted to pass out of the last car across a runway to the last dock, the end of the runway slipped from the car, or at least, slipped so much out of position as to cause it to fall, taking the truck of sugar and plaintiff down with it.

The negligence charged relates to the mode of fastening or securing the runway to the floor of the car. There was evidence tending to show that Brown, another employee, nailed a cleat to the floor against which the end of the runway rested and that holes were in the runway itself through which nails were partly driven into the floor. There was further evidence which tended to prove that the end of the runway was some higher than the floor of the car, and while it was secure for trucks coming into the car, it was not for cars going out by reason of the fact that the wheels of the loaded truck would strike it and sometimes throw it out of position.

The real question in the case, as it has been made and presented by defendant, is that the safety of these appliances and ways for unloading the sugar was in the hands of plaintiff and his fellow laborers. That defendant had placed at their disposal proper material and appliances for safely performing their work and if such appliances became unsafe it was the fault of the workmen and not the negligence of the employer. Thus if the end of the runway was not securely fastened to the car floor, it was the negligence of Brown, said to be plaintiff's fellow servant, or perhaps plaintiff's own fault, in not securing it himself.

There is a line of authority, notably in what is termed scaffolding cases, where it is held that if the owner furnishes lumber and material out of which a carpenter is to build scaffolds, and from which the carpenter can find suitable material, the owner is not liable for what may happen on account of the insecurity of the scaffolding. [Williams v. Ransom, 234 Mo. 55; Forbes v. Dunnivant, 198 Mo. 193; Bowen v. Ry. Co., 95 Mo. 268; Steffenson v. Roch. Co., 136 Mo. App. 225; Herbert v. Wiggins Ferry Co., 107 Mo. App. 287; Kelly v. Norcross, 121 Mass. 508; Killea v. Faxon, 125 Mass. 485.] Of course, the same rule will apply to other kind of work, as where simple duties are en-

trusted to the servant or a fellow servant (*Modlagl v. Iron & Foundry Co.*, 248 Mo. 587) but the evidence in behalf of plaintiff does not place his case under such rule. The evidence tends to show that this work was being done under the orders and direction of a foreman representing the defendant. It was his duty to see that the place over which the work was being done, was reasonably safe; and the jury has said that he did not. This was one of the master's positive duties which, if he deputizes to another servant, must be performed by him. "For the law is that the master's duties to the servant cannot be laid aside by him, or put upon others in such way as to exculpate him when an injury happens by reason of their nonperformance. . . . It makes no difference how low down in the scale of employment a master may go to find a servant to deputize to perform for him a duty to the other servants. Whoever the master selects to act in his stead, becomes, as to that duty, the master himself. [*Zellers v. Mo. Water Co.*, 92 Mo. App. 123, 124, 125.]

Nor is there ground for the claim that Brown, who, as we have stated, is said to have placed and secured the end of the runway in the car, was solely to blame and that his negligence was that of a fellow servant and gave plaintiff no cause of complaint against defendant, their common employer. Defendant cannot shift the duty to provide a safe place to work. [*Zellers v. Mo. Water Co.*, 92 Mo. App. 123-127; *Johnson v. Bolt & Nut Co.*, 172 Mo. App. 214, 219; *Scheidler v. Iron Works*, 172 Mo. App. 688, 694; *Mullery v. Telephone Co.*, 180 Mo. App. 128.] And if we grant that Brown, ordinarily would have been regarded as a fellow servant and that he may have performed the manual labor in attempting to attach the end of the runway to the car, it counts for nothing. It is oftener than otherwise, that the employer does not, himself, perform the labor of fixing or constructing a place in or about which his employees are to work. It is his

duty to see that his servants who do the labor, do it properly. And it is said by our Supreme Court, and by this court, that when the master uses another servant in fixing or constructing a place in which other servants are to perform their duties, the former servant, while so engaged, is not a fellow servant. [Keorner v. St. Louis Car Co., 209 Mo. 141, 158; Zellars v. Mo. Water Co., 92 Mo. App. 123-127.]

We have examined the cases cited by defendant, but the foregoing discloses that we think them not applicable. We find no error at the trial and hence affirm the judgment. All concur.

CARTER STEWART et al., Respondents, v.
ESTATE OF THOMAS TURNER, Deceased,
Appellant.

Kansas City Court of Appeals, June 14, 1915.

PROBATE COURTS: Contracts: Claim for Services Rendered.

When parties enter into the employment of a person and accept money, etc., as their compensation, without complaint, they cannot after his death maintain a valid claim against his estate for services over and above what they were paid, especially where they not only fail to prove a contract of employment, but also utterly fail to prove any indebtedness from their employer to them under the terms of that contract.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris*, Judge.

REVERSED.

Gillespie & Conley, H. D. Murry and N. T. Gentry for appellant.

L. T. Searcy and Harris & Finley for respondents.

JOHNSON, J.—Plaintiffs, who are husband and wife, filed the following demand in the probate court of Boone county, against the estate of Thomas Turner, deceased:

“Columbia, Mo., December 15, 1913.

“The Estate of Thomas Turner, Deceased.

To Carter Stewart and Annie Stewart, Dr.

To 244 weeks' joint services from
October 10, 1908, to July 2, 1913, rendered
at the instance and request of the deceased,
as nurses, companions, housekeepers, farm
managers and laborers at twenty-five dol-
lars (\$25.00) per week.....\$6100.00

To amount due claimants for money
paid and materials furnished deceased in
defraying expenses of farm and household
as per itemized statement hereto annexed
and marked 'Exhibit A,'.....\$ 476.70

\$6576.70

By amount of credits on account as
per statement hereto annexed and marked
'Exhibit B'.....\$1157.52

Balance due claimants.....\$5419.18”

Itemized statements of the alleged disbursements
of plaintiffs and of the credits were attached to the
demand which was verified by the affidavit of plain-
tiffs. An answer filed by defendant, in addition to
a general denial, pleaded a misjoinder of parties plain-
tiff and alleged that “whatever services were ren-
dered the said Thomas Turner by the plaintiff Carter
Stewart and whatever services were rendered the said
Thomas Turner by the plaintiff Annie Stewart were
fully paid for by the said Thomas Turner during his
lifetime.”

In the circuit court defendant demurred to the
petition on the ground of a misjoinder of parties

and after the demurrer was overruled, filed a motion to elect, which also was overruled. Defendant answered and at the beginning of the trial renewed the objection which the court overruled, that, on the face of the petition "the services were not jointly rendered and that a joint claim cannot be here prosecuted and hence there is a misjoinder of the parties plaintiff."

At the conclusion of the evidence heard at the trial plaintiffs dismissed the second item of their demand and the claim for two-hundred-forty-four weeks joint service was submitted to the jury. The verdict was for plaintiffs in the sum of \$750 and defendant appealed.

Thomas Turner died in Boone county July 2, 1913, at the age of ninety-three years. His second wife had died in January, 1908, and he continued to reside on his farm of one-hundred-twenty acres in Boone county, two step-daughters keeping house for him. Plaintiff Annie Stewart was his daughter and she and her husband Carter Stewart with their children, who were grown, were living in Oklahoma. In February, 1908, Mr. Turner fell ill and sent for his daughter who came and nursed him through this illness. She returned to her family in July and in the latter part of that month received a letter, which afterwards she lost, purporting to have been written at the request of Mr. Turner and requesting both plaintiffs to come and live with him and run his farm for him. Four witnesses testified to the contents of the letter which bore the signatures of Thomas Turner and Essie Evans and was in the handwriting of the latter. From their testimony it appears that the letter said nothing about compensation but merely requested plaintiffs to come and live with Turner and manage his farm.

Plaintiffs responded to his request and lived on the farm with him from October 12, 1908, to the date of his death July 2, 1913. Their evidence tends to show

that Mrs. Stewart performed the necessary household work, raised chickens, made butter and, in addition to the ordinary duties of a farmer's wife, nursed her father when he was ill and took special care in the preparation of his food. Mr. Stewart did the usual work of a farmer and assisted in nursing and caring for the old man. He slept in the latter's room on a couch to attend to his wants at night and to maintain heat in the room in winter, as Turner was very susceptible to colds. Generally speaking he performed the duties of a body-servant, some of which were quite offensive. Although subject to attacks of illness, Turner was unusually active for a person of his great age and was in full possession of his mental faculties. All of the business of the farm was transacted by Stewart in his name and under his orders. He was punctilious in the payment of his debts and careful in his business dealings, especially with reference to incurring obligations. He seemed to be well pleased with the services of plaintiffs and remarked to some of the witnesses that his son-in-law was the best hand he ever had. He allowed his daughter to sell butter and eggs and to keep the proceeds and whenever hogs or other farm products were marketed he invariably gave his son-in-law one-half the proceeds. The total amount of such payments received by Carter was \$951.08. A witness introduced by defendant testified that after Turner's death and the discovery that he had not specially favored plaintiffs in his will, Carter remarked, "Father did give me half of the hog money and he thought he was paying me for my work but I didn't consider it anything." Another witness stated that during the relationship in question Annie had said that her father had replied to a request she had made for a more profitable arrangement for her husband, "if you and Carter ain't satisfied with what you are getting you can pull out. I can hire a man and his wife

for two hundred dollars a year to do everything you are doing."

Of course such testimony from defendant's witnesses is not conclusive of the fact that the old man thought he was fully compensating plaintiffs for their services, but we mention it as a prelude to the statement that there are no facts and circumstances in proof from which a fair inference might arise that Turner understood plaintiffs were not being reasonably compensated for their services. Unquestionably he understood their relationship was upon a business basis and when he paid over to Carter one-half of the cash income of the farm and allowed his daughter to keep the proceeds of the dairy and poultry, he thought he was discharging his obligations to them in full. That they allowed him to remain in this belief without contradiction is manifest, even from their own evidence and in its last analysis, the whole case of plaintiffs is bottomed upon the theory that by requesting their services Turner in legal effect undertook to pay them the reasonable value of such services and they were entitled to go to the jury upon proof that such reasonable value exceeded the amount they had received as compensation.

We agree with plaintiffs that the evidence leaves no room for any other conclusion than that Turner had no thought of being the recipient of gratuitous service from his daughter and son-in-law but recognized an obligation to pay them. He understood that he was to pay for what he received and was not to be the pecuniary beneficiary of filial affection. The evidence does not present an instance where a contract to pay for services rendered at the request of the benefited party should be implied, but discloses facts and circumstances from which an express agreement should be inferred that plaintiffs were to be compensated for their services. The nature of the relationship created by the contract of the parties was that of master and

servants and during the whole period of its existence the master, after fixing the measure of his servants' compensation according to his own ideas of their deserts, punctually paid them their earnings, in the obvious belief that he was discharging his obligations to them in full.

Manifestly they received these payments from time to time with full knowledge of his views on the subject of fair compensation and without protest or demur. Such acquiescence which settled into an unbroken course of conduct and dealing, covering a period of nearly five years, should be accorded no less effect than that of making this scale of wages fixed by the master an integral element of the express contract of hiring which bound both parties. Plaintiffs' own evidence leaves them in the position of having accepted these payments as in full discharge of their master's obligation, but with the undisclosed mental reservation that at the end of the service they would claim back pay according to their own ideas of the reasonable value of their services. Of course such position is untenable. Having agreed, as they did, to accept the master's wages as reasonable, they are bound by that agreement, regardless of what such services actually were worth. Usually in cases of this character there is evidence tending to show that the benefited party acknowledged to witnesses a pecuniary obligation on account of the services beyond what he had paid to the servant and which he expected to discharge, but here there is not only a complete absence of such evidence, but on the contrary, the declarations of the old man to witnesses, as well as his acts, show that he regarded plaintiffs as farm hand and housewife for whose services he was paying as they were rendered. Plaintiffs have not failed to prove a contract of employment but have utterly failed to prove any indebtedness from their employer to them under the terms of that con-

tract and the demurrer to the evidence should have been sustained.

The judgment is reversed. All concur.

JENNIE E. CLARK, Appellant, v. JOHN O. CLARK,
Respondent.

Kansas City Court of Appeals, June 14, 1915.

1. **DIVORCE: Jurisdiction: Appellate Practice.** The plaintiff sued for divorce alleging that the offense or injury complained of was committed within this State and while both of the parties resided in this State. The defendant failed to appear, and the court heard the evidence and dismissed the suit for lack of jurisdiction. *Held*, that matters of exception cannot be reviewed in the appellate court unless they are preserved in a motion for new trial, filed in proper time and the filing and overruling of the motion must appear in the abstract of that part of the record called the record proper to distinguish it from the bill of exceptions.
2. ———: ———: **Petition.** It is not necessary to allege in a petition for divorce that the plaintiff resided within the State one whole year next before the filing of the petition, if it is alleged that the offense or injury complained of was committed within the State or while one or both parties resided within this State.
3. **APPELLATE PRACTICE: Matters of Exception.** Matters of exception cannot be reviewed unless they are preserved by a timely motion for a new trial, and the action of the court in overruling such motion must appear in that part of the abstract called the record proper.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird*, Judge.

AFFIRMED.

W. W. Bryant for appellant.

No brief for respondent.

JOHNSON, J.—This is an action for divorce. The petition alleged statutory grounds and “that the offense or injury complained of was committed within this State and while both of the parties resided in this State.” There was personal service upon defendant but he failed to appear and made no defense. The court heard the evidence introduced by plaintiff and dismissed the suit “for want of jurisdiction.” Plaintiff appealed.

The petition states a cause of action. It was not necessary for plaintiff to have resided within this State “one whole year next before the filing of the petition” if, as she alleged, “the offense or injury complained of was committed within this State, or whilst one or both of the parties resided within this State.” [Sec. 2373, R. S. 1909; *Cheatham v. Cheatham*, 10 Mo. 296; *Collins v. Collins*, 53 Mo. App. 470; *Carter v. Carter*, 88 Mo. App. 302; *Johnson v. Johnson*, 95 Mo. App. 329; *Hinrichs v. Hinrichs*, 84 Mo. App. 27; *Coulter v. Coulter*, 124 Mo. App. 149; *Gordon v. Gordon*, 128 Mo. App. 710; *Stone v. Stone*, 134 Mo. App. 242.]

But the court would be without jurisdiction over the subject-matter if plaintiff failed to adduce evidence in support of that allegation. She was required not only to plead but to prove this jurisdictional fact and we find the abstract of the record is in such condition that matters of exception, such as the sufficiency of the evidence to establish her right to a judgment, are not before us for review. In the first place, there is no abstract of the evidence but merely a statement, in what purports to be the bill of exceptions, of plaintiff’s conclusion that her evidence tended to prove the constitutive facts of her pleaded cause. But passing over that defect without comment, there is another insuperable defect in the abstract which precludes us from considering matters of exception.

There is no clear distinction, as there should be, between that part of the abstract relating to record

proper and that purporting to be an abstract of the bill of exceptions, and the only mention we find of a motion for a new trial is in the following recital in the bill of exceptions: "In due time a motion for a new trial and arrest of judgment was filed by the plaintiff, both of which were overruled by the court, to which ruling the plaintiff then and there excepted and still excepts."

Aside from other objections which might be mentioned it is enough to say that matters of exception cannot be reviewed unless they were preserved by a proper and timely motion for a new trial and unless the filing and overruling of such motion appears in that part of the abstract called the record proper. In *Dalton v. Register*, 248 Mo. 150, decided after the promulgation by the Supreme Court of rule 32, which is the same as our rule 26, the opinion has this to say of the failure of the abstract of the record proper to show the filing of a motion for a new trial:

"It is true that in the abstract of a purported bill of exceptions, it appears that such a motion was filed, but in a line of cases we have held this insufficient. The cases are of such long standing and so numerous that the lawyers of the State must abide by them; and so consistent is the ruling that we shall not further restate the rule, other than to state that under these we have held that the abstract of the record proper, as distinguished from the abstract of the bill of exceptions, must show the filing and overruling of a motion for a new trial. And if it does not so show, then we have only the record proper before us for consideration. It is true that we have recently adopted a new rule of practice in this court, which we hope may be better understood and more generally followed than the one under which the cases suggested were decided, but this new rule cannot avail this appellant for two reasons (1) because his abstract was filed before the rule was adopted by the court, and (2) because the ab-

stract as filed does not comply either with the old or new rule.”

And in *State v. Scobee*, 255 Mo. 273, it is held “that, since that which has been called the record proper to distinguish it from that part of the record made so by the timely and proper filing of a bill of exceptions, fails to show either that the motion for a new trial was filed or that it was overruled, there is nothing before us except the record proper. [*State v. George*, 221 Mo. 519; *Hill v. Butler Co.*, 195 Mo. 511.] [See also, *Case v. Carland*, 175 S. W. 200.]

To the same effect are the cases of *Smith v. Russell*, 171 Mo. App. 324, and *State ex rel. v. Sly*, 180 Mo. App. 379, decided by this court after the adoption of rule 26. Matters of exception cannot be reviewed in the appellate court unless they were preserved in a motion for new trial, filed in proper time, and it is just as necessary now as it was before the adoption of rule 26 that the filing and overruling of the motion appear in the abstract of that part of the record called the record proper to distinguish it from the bill of exceptions.

As the court heard the evidence we cannot assume that he held that lack of jurisdiction appeared on the face of the petition and since the matters of exception are not before us we must assume that he dismissed the suit because of lack of sufficient evidence. The judgment is affirmed. All concur.

COOPER WESTON, Respondent, v. AMERICAN INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **INSURANCE, FIRE: Policy: Removal: New Location.** Where an agent for a fire insurance company issues a policy on household furniture stating it to be in a certain house when he knows it is not in that house, but is to be, and is immediately moved into it, the policy is valid and the company is liable for its destruction in its new location.
2. ———: **Policy Before Removal: Valued Policy.** Where household furniture is to be removed to a new location, but before removal an insurance company issues a policy describing it as in the new location, and, after removal the goods burn, the company is liable and the policy is a valued policy, under the statute, as in any other instance.
3. ———: **Vexatious Delay: Penalty: Good Faith.** Where a fire insurance company vexatiously refuses to pay an honest and legal claim of loss, the statute authorizes a jury to assess a penalty of ten per cent and plaintiff's attorneys fees against the company. But in determining whether the refusal was vexatious, the matter must be viewed as it appeared when the refusal was made. If, at that time, there was enough to excite a suspicion against the integrity of the loss, in the mind of a prudent and honest man in good faith endeavoring to ascertain the facts, there is no ground upon which to base a verdict for a penalty.
4. ———: ———: **Jury Question: Good Reason to Believe.** The question whether there has been a vexatious refusal of an insurance company to pay a loss is for the jury, but a verdict for the penalty will not be allowed to stand, where the company had good reason to believe that a fraud or false claim is being made.

Appeal from Jackson Circuit Court.—*Hon. A. C. Southern*, Judge.

AFFIRMED.

Fyke & Snider for appellant.

J. H. McVey and *Park & Brown* for respondent.

ELLISON, P. J.—Plaintiff's action is based on a policy of fire insurance covering personal property in the sum of fifteen hundred dollars. The judgment in the trial court was for her.

It appears that plaintiff owned household goods in a residence on Prospect avenue in Kansas City, Missouri, and she had a policy of insurance on them for \$300 for a term of three years. In about one year thereafter she concluded to move to 4605 State Line street. She went to defendant's agent and informed him of her intention to move to the latter street and that she desired to increase her insurance to \$1500. He cancelled the old policy, allowed her for the unearned premium and issued the new policy, locating the property as in the house on State Line street, to which it was to be removed. A few days thereafter she removed the property. Shortly after her removal she acquired other property, notably a piano, which she valued at \$300. In about one month after her removal, the house and her property were totally destroyed by fire.

In our opinion the policy attached as valid insurance in the new location as soon as it was removed there. The agent knew of the old policy and of the intention to remove to another place and consented to it, and increased the insurance in a policy which stated the property to be in the new location. The insurance was in fact made of property situated in a certain building, and though it was not there at the date of the policy, it was to be immediately taken there. The following cases, while not like this in all particulars, sustain plaintiff's case: *Pollock v. Ins. Co.*, 127 Mich. 460, 473; *Cooper v. Ins. Co.*, 96 Minn. 81; *Williamsburg Ins. Co. v. Cary*, 83 Ill. 453; *Hulen v. Ins. Co.*, 80 Kan. 127.

We are furthermore of the opinion that the policy became a valued policy in the new location for the sum insured. There is no reason why the law as to valued

policies on personal property should not apply in instances where there is a removal with the consent of the insurer. And this is true even though, at the time the policy is issued, none of the property is in the place to which the insured, with the consent of the insurer, intends to remove it, if it is there when burned.

The statute (Sec. 7030, R. S. 1909) as interpreted by the courts, directs insurance companies not to issue policies for more than three-fourths the value of the property, and that when a company issues a policy for a certain amount it will not be permitted to dispute that sum. That is to say, it will be conclusively presumed that the property is worth one-fourth more than the amount insured. In other words, the policy becomes a valued policy for the sum insured. [Gibson v. Ins. Co., 82 Mo. App. 515; Spickard v. Fire Assn., 164 Mo. App. 1, and cases cited.] But the amount to be recovered on such a policy will, of course, depend upon the status of affairs at the time of the fire. If there has been no change, the full amount insured is due, but if there has been a decline in value, a loss, or sale, of a part, with no corresponding increase by new acquisitions, such loss should be deducted; and this will apply to household furniture as well as merchandise kept for retail. But the basis of calculation will be an amount of which the sum named in the policy is three-fourths, which in this case is \$2000. [Spickard v. Fire Assn., supra.] It appearing in evidence that a few articles were not brought to the new location and that others were acquired after the policy was issued, it became necessary to ascertain if these changes reduced the total value below \$2000, and plaintiff made a statement, under oath, of what the property burned consisted, its value and when acquired. This showed a value slightly in excess of \$2000 and, if correct, entitled her to recover the full amount of the policy. Defendant attacks this statement as being falsely exaggerated and backed by perjury, which, it insists, should forfeit plaintiff's

right to recover. This was, however, submitted to the jury and we must accept the result, and hold plaintiff entitled to the amount of the policy and interest.

What we have already stated will serve as an introduction, or partial explanation, of what follows. Plaintiff was allowed, in addition to the sum named in the policy and interest, \$250 for her attorney's fees and \$150 as a penalty for vexatious refusal to pay. Usually interest is the penalty the law attaches to delayed payment of just indebtedness; but in the matter of payment for losses insured against, insurance companies had so frequently wilfully delayed and annoyed honest claimants by attempting to beat down their claim below the actual loss, that the Legislature saw fit to discourage such conduct by adding attorneys' fees and a penalty where the "company has vexatiously refused to pay the loss." [Sec. 7068, R. S. 1909.] But while that statute was enacted to discourage fraudulent practices by insurance companies, it was not intended to prevent them from investigating the integrity of losses claimed, and to resist their payment where the question involved was doubtful, or the conduct of the insured was such as to lead a reasonable person, acting in good faith, to believe that a fraud was being practiced. [Blackwell v. Ins. Co., 80 Mo. App. 75; Rogers v. Ins. Co., 157 Mo. App. 671, 683.] It is true the question is one of fact for a jury (Keller v. Ins. Co., 198 Mo. l. c. 460) but the jury in determining the fact, must, as in all other cases, have substantial evidence upon which to base a finding. [Patterson v. Ins. Co., 174 Mo. App. 37, 44; Kahn v. Ins. Co. (not yet reported), 173 S. W. 695.]

Of course, the question of vexatious refusal is not determined by the result of the trial. It must be settled from the view presented at the time of the refusal to pay. If that was such as to lead a prudent man, acting in good faith, to believe there was no liability, the company is not to be assessed with a penalty for

its honest intentions founded upon considerations which would induce belief in a prudent and practical man. [Blackwell v. Ins. Co., *supra*.] In this case the testimony of plaintiff herself is ample justification for defendant's belief that she had not a legal and honest claim. In making up values at time of the fire, she put in the property acquired after the issuance of the policy; chiefly a piano which she valued at \$300. In accounting for this piano she testified to a remarkable story. She stated that it was given to her by a strange man whose first name she did not know and whom she had only met on the street in Kansas City and at the parks. She did not know where he lived, nor where he was, nor whether he was married or single. All she knew was that he said to her at one of these meetings, "Little girl whenever you get a place to put a piano I will give you one," and that afterwards he sent it to her, but that she did not know who brought it or where it came from. Other evidence showed it to have been an old instrument practically worthless.

Certain other property stated to be of the value of \$637 in her proofs of loss, and placed at \$1200 in one of her sworn statements, she testified was given to her by a man named Taylor, a married man to whom she was engaged to be married "when he got a divorce." Taylor was an extra brakeman on a freight train, working "off and on" and earned from \$25 to \$60 per month, and gave her these articles in the space of a few months. He testified that he paid only \$86 for them.

There are many other circumstances in the record well calculated to arouse suspicion and honest inquiry by a prudent man. But the foregoing suffices to show that there is no justification whatever in inflicting the penalty on defendant for refusing to pay the claim. In fact, in the light of the record, it is a matter of grave doubt whether she should have had a verdict

for the insurance; but, as already stated, we have concluded that there was a question for the jury and hence will affirm the judgment, if plaintiff will, within fifteen days remit the sums found for a penalty and for attorneys' fees, otherwise, the judgment will be reversed and the cause remanded. All concur.

KANSAS CITY CASUALTY COMPANY, Re-
spondent, v. WESTPORT AVENUE BANK,
Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **CONTRACTS: Privity: Payee: Bank.** There is no privity of contract between a payee of an ordinary check and the bank upon which it is drawn, and hence the payee cannot maintain an action, *ex contractu* against the bank for the amount of the check.
2. **BANK CHECK: Action Ex Contractu: Ex Delicto.** A payee of a check may maintain an action, *ex delicto*, in conversion against the bank on which it is drawn, where the latter permits an agent of such payee, without authority, to endorse the check to it and places the amount to the agent's individual credit.
3. **CHECKS: Conversion: Property: Measure of Damages.** Bank checks are property and may be converted; and prima facie, the amount of the check is the measure of damages in an action for conversion.
4. **SALESMAN: Authority: Endorsement: Checks.** A travelling salesman for a wholesale grocery house with authority to sell and receive cash payments and also checks payable to the wholesale house, has no authority to endorse such check. And a bank accepting such endorsement and paying the money is guilty of a conversion.
5. ———: ———: ———. The fact that a travelling salesman for a wholesale house with authority to collect cash for sales and to receive checks payable to the house, deposits the cash with a bank to his individual credit and then checks it out to the house is not evidence sufficient to show that such salesman has, without authority, also endorsed its name on checks and deposited them to his own credit.

Appeal from Jackson Circuit Court.—*Hon. Jos. A. Guthrie*, Judge.

AFFIRMED.

Heidelberger & Houston for appellant.

McCune, Harding, Brown & Murphy and *Blatchford Downing* for respondent.

ELLISON, P. J.—Plaintiff's action is for conversion of a number of checks which were drawn by various retail customers, on their respective local banks, in favor of the Inter-City Grocery Company, in payment of accounts due for purchases from the latter company. The cause of action for the conversion was assigned by the latter company to plaintiff.

It appears that the Inter-City Grocery Company was a wholesale institution who had in its employ one J. S. Bell as a travelling salesman. He had authority to accept checks from his customers for accounts, payable to the Inter-City Grocery Company but did not have authority to transfer such checks by endorsement or otherwise.

Bell did his private banking business with defendant and the Grocery company in writing to customers for payment of their accounts learned from them that they had paid Bell by checks which, in some instances, were sent in to the Grocery company marked as cancelled. In that way it was discovered that Bell had endorsed them to the defendant bank by signing the Grocery Company's name, per himself, and had them placed to the credit of his private account, and that defendant had collected them from the various local banks on which they were drawn.

Since plaintiff's right depends entirely upon the right of the Grocery Company, we need only consider what right the latter has. Defendant insists that it

had none and to sustain such insistence relies strongly on Grocer Co. v. Bank, 71 Mo. App. 132, wherein it is decided that there is no privity of contract between the payee of an ordinary check and the bank upon which it is drawn; and hence, that such payee has no right of action against the bank which has paid the check on his forged, or otherwise unauthorized endorsement. The action in that case, was in contract against the bank upon which the check was drawn; while this action is in conversion against an intervening, or rather, an intermeddling, bank. The same may be said of Biscuit Co. v. Grocer Co., 143 Mo. App. 300, where the action was against the drawee of a draft. But we will not avoid the question presented on the ground of a difference between those cases and this, so far as rights in contract may be concerned. We concede that there was no privity of contract between the Inter-City Grocery Company and defendant, and hence no right to sue defendant upon a contract existed or was assigned to this plaintiff; and thus we fully recognize the soundness of that class of authority in which Grocer Co. v. Bank, supra, has placed the courts of this State.

But the present action is not *ex contractu*; it is *ex delicto*. Defendant bank has not contracted to pay the Inter-City Grocery Company the amount of the checks in controversy, but it has wrongfully intermeddled with them to the exclusion and in disregard of the rights of the true owner; and that is a conversion. A conversion is "Any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it." [2 Cooley on Torts, 859.]

Personal property, as understood in these definitions, includes choses in action, such as notes, bills, checks, and other representatives of value; for a representative of value, is, itself, a thing of value. Hence it has been decided that an army commissary

voucher, or a writ of execution may be converted; Koch v. Branch, 44 Mo. 542; Keeler v. Fassett, 21 Vt. 539. So may a certified account; O'Donoghue v. Corby, 22 Mo. 393; and a promissory note; Richardson v. Ashby, 132 Mo. 238, 249; Vanstandt v. Hobbs, 84 Mo. App. 628; Kaufman v. Bank, 151 Mich. 65; Warren v. Smith, 35 Utah, 455. And so may a share or certificate of stock; Newman v. Trust Co., 189 Mo. 423; Withers v. Bank, 67 Mo. App. 115. And a draft, Williams v. Wall, 60 Mo. 318. Checks, such as these in controversy, are regarded in the same way, as is evidenced by several cases; Blum v. Whipple, 194 Mass. 253; Schmidt v. Bank, 19 N. Y. Supp. 252; Buckley v. Bank, 35 N. J. L. 400; Lovell v. Hammond Co., 66 Conn. 500, 510; Krager v. Pierce, 73 Iowa, 359; Columbia Mill Co. v. Nat'l Bank, 52 Minn. 224; Keiner v. Folsom, 79 N. Y. Supp. 1099; Graton v. Redelsheimer, 28 Wash. 370, 379; 28 Am. & Eng. Encyc. of Law, 649; 2 Cooley on Torts, 856.

And the measure of damages is *prima facie* the face value of the paper converted. [O'Donoghue v. Corby, 22 Mo. 393; Lovell v. Hammond Co., 66 Conn. 510; Graton v. Redelsheimer, 28 Wash. 379.]

It is suggested that the Inter-City Grocery Company is not harmed if there is a denial of a right to hold the defendant bank, for the reason that it may yet recover from the makers of the checks. But that plea will not excuse defendant's wrongful act. The Grocery Company had a choice of remedies, one of them being for the wrong done by defendant. The suggestion is well disposed of in Solomon v. Bank, 59 N. Y. Supp. 407, in these words: "A person or corporation who converts a promissory note or check to his or its own use is liable in damages for the conversion in an amount equal to the amount due on the promissory note or check. [Citing authorities.] This action is in no sense an action on contract. Undoubtedly the plaintiffs had a right to sue the makers of the checks

respectively, but they have elected to avoid the burden of bringing twenty-four suits against the drawers of the checks respectively, all but one of which suits would be against nonresidents of this State, and they have sued the defendant and seek to recover as damages the amount of all the checks in one action. A person whose property has been wrongfully converted is not bound to take the same back. He may abandon it from the moment of its conversion and sue for its value."

The fact that Bell was a salesman with authority to collect bills in cash, or to receive checks, did not carry with it implied authority to endorse checks. [Graham v. U. S. Savings Inst., 46 Mo. 186; Jackson Paper Co. v. Bank, 199 Ill. 151; Exchange Bank v. Thrower, 118 Ga. 433; Blum v. Whipple, 194 Mass. 253; Rosenberg v. Germania Bank, 88 N. Y. Supp. 952; Schmidt v. Bank, 19 N. Y. Supp. 252; Jacoby v. Payson, 32 N. Y. Supp. 1032; 1 Daniels on Neg. Inst. (4 Ed.), 292; 1 Mechem on Agency (2 Ed.), sec. 952.]

But defendant insists that there was, at least, apparent authority arising from the conduct of the Grocery Company in the nature of an estoppel. We think there is no evidence to sustain that view. It seems that Bell, besides being the Inter-City Grocery Company's travelling salesman, owned a small retail grocery store which he operated for himself, wholly apart from his employment by the Grocery Company. As has been stated, he kept a bank account with defendant. Frequently he paid collections he made for the Inter-City Grocery Company to that company by giving his check on his account with defendant. We do not see anything to be made in defendant's favor from that circumstance. Bell had authority to collect cash payments from customers and to take their checks payable to the Inter-City Grocery Company; and he would, from time to time, send his checks on defendant bank and customers checks to that company; in full or part payment, as the case might be, of customers ac-

counts. The undisputed evidence was that the Inter-City Company supposed his checks were for cash he had received from customers and never supposed that any were to meet customers checks to it, which he, without authority, had endorsed with its name and put in his individual account. As we understand defendants point, it is this: that when Bell sent his individual check on defendant bank to the Grocery Company, that act, at least, made known to the company that Bell was depositing with defendant his cash collections from customers and from that fact the company should have known, or believed, that he was also endorsing its checks to defendant. We think it does not follow. It was defendant's duty for its own protection to have ascertained from the Grocery Company whether Bell had authority to endorse its checks. Such authority is an extraordinary power. Checks are negotiable instruments and authority to endorse the payee's name lays the way open for the endorsee to hold the payee liable on the endorsement. So we conclude there was no evidence upon which to ground an estoppel.

There was no demurrer to the petition. We have no doubt that, after verdict, it must be held to have stated a cause of action. What we have written disposes of questions on instructions.

The judgment must be affirmed. All concur.

JOHN A. SHOWEN, Admr., Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 14, 1915.

1. **EVIDENCE:** Deposition: In Former Trial: Contradiction. When a witness is confronted with his deposition, or a bill of exceptions in a former trial, for the purpose of contradicting

Showen v. Metropolitan Street Railway Co.

his present testimony, he is entitled to see the whole of his testimony, on the subject in hand; and, unless the whole is introduced, it is error for opposing counsel to select special parts with which to contradict him.

2. **PERSONAL INJURY: Death: Damages: Expectancy of Life: Date of Death.** Where a party is injured through negligence of another and dies before judgment, but not from his injury, his administrator is not entitled to recover damages for a period covering his expectancy in life; but only up to his death.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird, Judge.*

REVERSED AND REMANDED.

John H. Lucas and L. A. Laughlin for appellant.

Ed. E. Aleshire, John A. Showen and R. S. Robertson for respondent.

ELLISON, P. J.—Plaintiff's intestate, Cyrus C. Armstrong, was injured while attempting to alight from one of defendant's street cars on which he was a passenger. The deceased instituted an action for damages. He died before judgment was rendered and plaintiff was appointed his administrator. Plaintiff then became a party and filed an amended petition, and on trial recovered judgment. This judgment was reversed by this court (164 Mo. App. 41). Another trial was had and plaintiff again recovered. Defendant then appealed to the Supreme Court and that court transferred it here.

Defendant introduced one Rardin as a witness in its behalf. In cross-examination plaintiff's counsel confronted him with his deposition taken in a former trial, or with his evidence as contained in the bill of exceptions taken at the former trial (counsel have not stated which), and asked him if he did not make certain statements therein at the former trial, and then

introduced these selected statements in evidence. This was objected to, but permitted by the court. Counsel should have read the whole of his evidence on that particular subject. For, other parts of it might have made consistent what otherwise would appear to be contradictory. [Prewitt v. Martin, 59 Mo. 325, 334; State v. Stein, 79 Mo. 330, 332; State v. Matthews, 88 Mo. 121, 125; Wilkerson v. Eilers, 114 Mo. 245, 251.] If counsel had merely exhibited the deposition to the witness and asked him if he had not made certain statements therein, and then have failed to have introduced the deposition, thus leaving the jury to infer that the witness was right, perhaps no harm would have been done under the view expressed by the Supreme Court in State v. Matthews, *supra*. But, as we have stated above, plaintiff, over defendant's protest, introduced in evidence the small part selected by him. It was a violation of a fundamental rule of evidence. The deposition should have been shown to the witness, the whole of it, or that part relating to the subject in hand, should have been introduced. Then any special pertinent questions could have been asked.

For the purpose of discrediting the testimony of one of defendant's witnesses, a draft of a petition drawn by attorneys for Armstrong, plaintiff's intestate, was introduced in evidence over defendant's objection. The witness had been in the office of those attorneys and knew something of the case from conversations with Armstrong. We do not see that it had any bearing on the case and it should have been excluded.

Though the death of deceased followed some time after his injury, yet it was not caused by such injury. The evidence tended to show permanent physical injury to the leg and hip, and much pain and suffering. An instruction on the measure of damages called attention to these conditions and was so worded that the jury might allow damages for the ordinary expectation

of life for a man of Armstrong's age, though it did not so direct. In instances where the injured party dies from other causes, before judgment, damages should be limited to the space of time between the date of the injury and the death. [Railroad Co. v. Chance, 57 Kas. 40, 48; Ill. Steel Co. v. Ostrowski, 194 Ill. 376, 387; S. C. 93 Ill. App. 77; Wetherall v. Railroad, 104 Ill. App. 357; Welch v. Railroad, 7 Del. 140, 145.]

The judgment is reversed and cause remanded. All concur.

**FIFTH-THIRD NATIONAL BANK, Respondent, v.
PHILIP H. McCRORY et al., Appellant.**

Kansas City Court of Appeals, June 14, 1915.

1. **BILLS AND NOTES: Collateral: Amount of Recovery: Burden of Proof.** In an action against the maker on notes endorsed by the payee to the plaintiff before maturity, as collateral security for a debt, the payee owes the plaintiff, if the maker has a good defense against the payee, the plaintiff can only recover the amount of the secured debt. And the burden is on him to show the amount of such debt.
2. **PRESUMPTION: Knowledge of Fact.** A party litigant who is in possession of knowledge of the fact whether a debt from a third party is still owing him, must show the fact. He cannot be permitted to show that two and a half years prior to the trial the debt was owing to him and invoke a presumption that the debt still is owing at time of the trial.

Appeal from Jackson Circuit Court.—*Hon. Thos. J. Seehorn*, Judge.

REVERSED AND REMANDED.

Casey & Wright and *Calvin & Rea* for appellant.

Ellis, Cook & Barnett for respondent.

ELLISON, P. J.—Plaintiff claims to be the endorsee, in due course, of four negotiable promissory notes executed by defendants to the "Combined Distillers of Kentucky," each for \$160.67, and each dated April 4, 1908, due respectively September, April, May and June 10th thereafter. The judgment in the trial court was for the plaintiff.

It was conceded at the trial that two of the notes were unpaid, but as to the others defendants' claim was that they had been paid to the payee before plaintiff acquired them, except, perhaps, a nominal amount, and that plaintiff was not a good faith holder for value, in due course. Plaintiff claims to have acquired the notes from the Distillers Company before they were due as collateral security for advances of money loaned to that company. The case was before this court on another occasion and will be found in 164 Mo. App. 144, where the facts, as then involved, are stated.

The facts upon which the result of the present appeal depends are simple: The notes having been paid by defendants to the Distillery company and plaintiff only claiming to hold them as collateral security for an antecedent debt, it could only recover the amount of that debt and the burden was on the plaintiff to prove such debt and the amount of it. [Johnson v. Grayson, 230 Mo. 380, 403-407; Link v. Jackson, 158 Mo. App. 63; Bank v. Hanks, 142 Mo. App. 110.] For it must be clear, that if defendants paid the notes to the Distillery Company and they must now pay again to plaintiff as an innocent endorsee, they should not pay more than it is entitled to receive on its principal debt.

Plaintiff claims that it made such proof in the deposition of its supervisor of loans. It may be conceded that the deposition did show that the notes were acquired by plaintiff from the Distillery Company in good faith, before they were due, as collateral security for a loan made to the company and that no part of

such loan had been paid; and that that company was insolvent and in the hands of a receiver. But defendants call attention to the fact that the deposition was taken two and one-half years before the trial of the case, and therefore it was not proof that plaintiffs had not received payment in whole, or in part, after the deposition was taken and before the trial. Plaintiff responds to this by insisting that though the evidence related to a condition existing two and a half years anterior, yet the evidence is sufficient, under the rule of law that a condition shown once to have existed will be presumed to continue until the contrary appears.

The law as to the presumption of the continuance of things or conditions shown to have once existed, is frequently stated in such general terms as to be confusing and misleading. The application of a presumption of continuance of the condition of things depends upon what they are. If the things are such as in their nature are not continuous, then there is no presumption. The presumption, itself depending on the nature of things, should never be allowed such application as will oppose the nature of such things. Certain conditions in the affairs of men, or things, may be renewed from time to time and have no continuity. Others are likely, in the general order, to continue, and usually do continue for a longer or shorter period, and the force, or persuasiveness, of the presumption of their continuance depends upon information, observation and experience.

But there is an inquiry, which we think, stands as a reason in the way to an affirmance of the judgment. It is this: Has plaintiff a right to ask the aid of a presumption? A fundamental rule of evidence is that which requires a litigant to put his best foot forward. It is laid down in Greenleaf's Evidence, volume 1, section 82, that "A fourth rule which governs in the production of evidence is that which requires the best evidence of which the case in its nature is susceptible.

This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had."

A presumption is only allowed from necessity, to prevent a failure of justice, in cases where the litigant has nothing better. It is not allowed when the party seeking its indulgence knows, or has evidence of the actual fact. That is, when a litigant does not need it, he should not ask it. [Burge v. Railroad, 244 Mo. 76, 94-96; Tetwiler v. Railroad, 242 Mo. l. c. 194; Glassman v. Harry (not yet reported), 170 S. W. 403.] Those were cases where the facts were drawn out in evidence. But the reason must necessarily apply where the facts are in the knowledge of the party and witnesses and are kept back. In Mockowick v. Railroad, 196 Mo. 550, 571, the Supreme Court said that whether reliance was placed upon certain ordinances was a fact susceptible of proof as other facts, and should be proved by the best evidence of which the case would admit. And that the plaintiff in that case, of all men, knew what the facts were, and, having declined to speak, he should not be allowed to invoke the aid of a friendly presumption.

Plaintiff's witness in charge of its loan department, and plaintiff itself, had personal knowledge of the fact whether all, or any part, of the Distillery

Company's debt was unpaid at the time of the trial. They had knowledge of all the facts, and it seems idle to say that they should have the assistance of a presumption of a matter the truth of which they have actual knowledge. A supposable instance will well illustrate the correctness of this view. Plaintiff's witness, as already stated, was its superintendent of loans in charge of its loan to the Distillery Company, for the payment of which the notes in controversy are claimed to have been pledged as collateral. Suppose, at the trial, he had been asked, directly, if the Distillery Company owed it that loan, and he had answered that the Company did owe it two and one-half years prior to the trial. Would the witness have been allowed to suppress or conceal his knowledge of present actual conditions and state a condition so long in the past? Would plaintiff have been permitted to say that such an answer proved the indebtedness existed at the trial? And would not such an unnatural and unreasonable course be suggestive of a fraudulent necessity to conceal the truth as it existed at the trial?

It is scarcely necessary to add that we have not a case involving that class of presumptions arising in cases presenting the feature, *res ipsa loquitur*; which, in effect, are instances where proof of one thing is proof of another thing following from the first.

Nor are we dealing with that class of cases where a creditor proving his debtor's obligation to him, the burden is on the debtor to show subsequent payment or discharge. In such instance the debtor must know whether he has paid his debt. But the question we have in this case, is whether a *third* person has paid his debt to one who is seeking to recover the amount of it from another who is said to owe such third person; the nature of the case being that the party so endeavoring to recover knows whether the third person has paid the debt to him and the other party does not know. In such instance, reason and law place the burden on

plaintiff of showing such indebtedness was owing to him.

The judgment is reversed and the cause remanded.
All concur.

BAYARD H. PAINE, Respondent, v. J. F. O'DONNELL, Appellant.

Kansas City Court of Appeals, July 2, 1915.

1. **ATTORNEY AND CLIENT: Contracts: Claims Against Estates.** When the record before the appellate court discloses sufficient evidence to sustain plaintiff's claim of employment and that he performed the services required thereunder, so far as a judgment based on said evidence is concerned, it will be presumed, on appeal, that the court reached the correct result.
2. ———: ———: **Judgment.** Judgments remain in the breast of the court during the entire term at which they are rendered and may be set aside or vacated at any time during the term upon its own motion.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas*, Judge.

AFFIRMED.

E. J. Shannahan and Broaddus & Crow for appellant:

New, Miller, Camack & Winger and *John Davis* for respondent.

TRIMBLE, J.—This was a suit to recover an attorney's fee of \$50 claimed as due plaintiff on a contract made with defendant wherein the latter agreed to pay plaintiff that sum for getting a claim allowed against an estate or for collecting it. The case originated in a justice court, and, upon trial and judgment

there, was appealed to the circuit court where it was tried *de novo* before the court without a jury. The court took the case under advisement and three days later found the issues for plaintiff and a judgment was entered in his favor for \$50. Defendant filed no motion for new trial, but some ten or twelve days after the entry of said judgment but at the same term, the court, upon its own motion, set it aside, and five days thereafter, still at the same term, found the issues for plaintiff and rendered judgment in his favor for \$50. Thereupon, within four days, defendant filed a motion for new trial which was overruled and this appeal was taken.

There were no declarations of law given or findings of fact requested. The record discloses sufficient evidence to sustain plaintiff's claim of employment and that he performed the services required of him thereunder. Hence, so far as a judgment for plaintiff based on said evidence is concerned, it will be presumed on appeal that the court reached the correct result. [Winfrey v. Matthews, 174 Mo. App. 713; Sommer v. Bryson, 168 Mo. App. 335; Warner v. Close, 120 Mo. App. 211.]

It is contended here that the trial court having set the entry of the former judgment aside had no right to enter the last judgment without having another trial and hearing evidence. Counsel making this claim are not the counsel who represented defendant and filed the motion for new trial, upon the overruling of which this appeal was taken. It should be stated that this motion for new trial admits that the judgment it complains of was rendered upon testimony heard by the court because the motion continually refers to "the evidence" and to "the undisputed facts in the evidence" and insists that upon it the court should have found for defendant. Said motion also in paragraph number 7 sets forth what, in defendant's opinion, the evidence did show. There is nothing in the bill of

exceptions showing whether any testimony was heard after the first judgment was set aside or not. It is merely silent upon that question. Neither does the motion for new trial make any point or complain of the fact that no evidence was heard; nor was any motion in arrest filed. We do not rest our decision upon the absence of these, but merely state them as facts appearing in the case.

However, we will dispose of the case on the assumption that no evidence was heard after the entry of the former judgment was set aside. All of the acts of the court were done at the same term and while it was yet in existence. Judgments remain "in the breast of the court during the entire term at which they are rendered and may be set aside or vacated at any time during the term upon its own motion." [Harkness v. Jarvis, 182 Mo. 231, l. c. 235; Shuck v. Lawton, 249 Mo. 168, l. c. 173.] During the term, the court has plenary control of its judgments, orders, etc., therein made and may amend, correct, modify, revise, supersede, revoke or vacate them as in its discretion may seem necessary. [23 Cyc. 860.] "It has absolute control over its own judgments and decrees during the term at which they were rendered, and may therefore, at any time before the expiration of the term, in the exercise of its discretion, open, amend, correct, reverse, vacate or supplement any judgment or decree rendered during such term. [17 Am. & Eng. Ency. of Law (2 Ed.), 813; 1 Black on judgments (2 Ed.), sec. 305.]

Now the record does not disclose why the court set aside the first entry, nor are the two entries set out in the record so that it can be seen wherein the last differs from the first. There is a difference between the rendition of a judgment and the entry thereof upon the record. [1 Black on Judgments (2 Ed.), sec. 106.] Whether the first entry was inadvertently made before the court intended that it should be, or

whether there was some clerical or other irregularity therein which the court sought to correct by setting it aside and having another entered, does not appear. All that is certain is that one legal result was the same in both, the defendant was adjudged to pay plaintiff \$50. It is certain that the entry of the first judgment was not set aside for any error occurring in the trial since the court did not grant a new trial. If a new trial had been granted doubtless another judgment could not have been entered until a new trial had authorized it. But no new trial was granted. As the whole matter was in the breast of the court we see no reason why the court could not set aside the first entry and thereafter render judgment upon the evidence which he still had within his consideration. The evidence he had heard fully justified the judgment and the last entry was no broader than the first in its legal effect upon defendant. Nor was any claim up to that time made that it was broader or that other evidence could be adduced which would change the result, nor indeed is there any such claim now made. In *Taylor v. Gribble*, 33 S. W. (Tex.), 765, it was held that where a cause was tried before the court without a jury the court could, at the same term, vacate a judgment rendered in favor of defendant and render one in favor of plaintiff without rehearing the evidence or having another trial. If this can be done, surely the court can at the same term set aside a judgment in favor of a party and reenter a judgment for the same amount in favor of the same party. In *Commonwealth v. Weymouth*, 84 Mass. 144, it was held that a trial court, could, after sentencing a prisoner and after the commitment in execution of the sentence had been issued but before it was executed, revise and increase the sentence which, of course, was the judgment itself. [See, also, *Walmerstadt v. Jacobs*, 61 Iowa, 372.]

The whole matter, evidence as well as the judgment to be pronounced therein, having been submitted to the court and being within the breast of the court for its consideration and determination, and it being the court's duty to render a correct judgment on said evidence, and to correct any erroneous entry that may have been made therein, and nothing appearing in the record showing that a new trial was granted, we are unwilling to hold that the last entry of the judgment made by the court was void.

The judgment is, therefore, affirmed. All concur.

STATE OF MISSOURI, Respondent, v. H. P.
HUXOLL, Appellant.

Kansas City Court of Appeals, July 6, 1915.

1. **INDICTMENTS AND INFORMATION: Practicing Medicine Without License.** An indictment, which in one count charges a defendant with practicing medicine without a license from the State Board of Health, and, also with failing to record his license in the county of his residence, is not a good indictment, because the latter offense is under section 8314, R. S. 1909, and the former under section 8315, R. S. 1909, and, further, because two or more distinct separate offenses cannot be charged in the same count of an indictment.
2. ———: ———: **Language of Statute.** Where an indictment is not in the language of the statute and does not negative the exceptions therein contained, it comes within the rule that, where an indictment is unnecessarily particular in its negatives, the State is concluded by it, if it fails to specifically negative all exceptions.
3. **INSTRUCTIONS: Practicing Medicine Without License.** An instruction which told the jury that they should find the defendant guilty if they believed from the evidence beyond a reasonable doubt that the defendant, for pay, treated the person, and, at the time of such treatment, if any, "had no license from the State Board of Health recorded in the office of the county clerk," etc., is erroneous.

Appeal from Gasconade Circuit Court.—*Hon. R. A. Breuer*, Judge.

REVERSED.

W. J. Ellis for respondent.

Garlington & White and *Morris & Hartwell* for appellant.

TRIMBLE, J.—Defendant was prosecuted by indictment, under section 8315, Revised Statutes 1909, for practicing medicine without a license from the State Board of Health. He was convicted and fined \$50, from which he appeals.

The conviction cannot be permitted to stand for several reasons. One of which is that the State's instruction defining the offense told the jury that they should find the defendant guilty if they believed from the evidence beyond a reasonable doubt that the defendant, for pay, treated the sick person, and, at the time of such treatment, if any, "had no license from the State Board of Health recorded in the office of the county clerk," etc. This would permit the jury to find the defendant guilty if they had found that he had a license from the State Board of Health but had not recorded it in the county. Such act would be an offense under section 8314, Revised Statutes 1909, which creates a different offense with a different penalty from that of section 8315. The indictment was drawn, and the case was submitted, apparently upon the theory that the two sections created but one offense, which is clearly an incorrect view. The indictment is in one count and charges the defendant with practicing medicine without a license from the State Board of Health and also with failing to record his license in the county

of his residence. The latter is an offense under section 8314 and the former is an offense under section 8315. These are inconsistent, separate and distinct offenses varying in their elements and having different punishments. The indictment is so worded as to be difficult if not impossible to understand which offense is in fact sought to be charged and relied upon even if it can be said that it so negatives the existence of a certificate from the State Board of Health as to render the charge of failing to record same in the county of defendant's residence mere surplusage. We are of the opinion that this charge cannot be treated as surplusage. It was not so treated in the trial and we are therefore of the opinion that the indictment was not good as a foundation for this criminal prosecution. It is well settled that two or more distinct and separate offenses cannot be charged in the same count of an indictment. The indictment also negatives the fact that defendant belongs to certain specified classes of persons to which article one of chapter 78, Revised Statutes 1909, does not apply, but the indictment fails to contain all of said exceptions. Without deciding whether the indictment is bad because it fails to aver that defendant is not a physician who was registered on or prior to March 12, 1901, as was held in *State v. Hellscher*, 150 Mo. App. 230 (and cited with approval by the Supreme Court in *State v. Carson*, 231 Mo. 1, l. c. 13, though the citation erroneously gives the volume and page of the *Hellscher* case as being 149 Mo. App. 231), and as also held in *State v. Brand*, 153 Mo. App. 27, and *State v. Hellscher*, 156 Mo. App. 62, or whether it is not defective on that account as held in *State v. Humfeld*, 182 Mo. App. 639, wherein the St. Louis Court of Appeals overrules its former decisions on this point, we are of the opinion that this indictment, not being in the language of the statute and having undertaken to negative the exceptions therein contained, should have negatived all of them. The rule is that where

an indictment is unnecessarily particular in its negatives the State is concluded by it if it fails to specifically negative all of the exceptions. [22 Cyc. 347; State v. Pitzer, 23 Kans. 175.] We are therefore of the opinion that the judgment should be reversed without remanding since if the State desires to further prosecute it would be better to start a new prosecution upon a proper indictment rather than to attempt to pursue this under the present indictment as it is drawn.

The judgment is therefore reversed with directions to discharge the defendant from further liability on account of this indictment. All concur.

**ALICE FARBER, Respondent, v. AMERICAN
AUTOMOBILE INSURANCE COMPANY, Ap-
pellant.**

St. Louis Court of Appeals, April 6, 1915.

- 1. FIRE INSURANCE: Valued Policy Law: Effect of Misrepresentation Concerning Value of Property.** Sec. 7030, R. S. 1909, providing that no insurance company shall take a risk on any property at a ratio greater than three-fourths of its value, and, "when taken," its value shall not be questioned in any proceeding, applies to insurance on personal and real property, and is a part of every policy of fire insurance, and estops insurer, issuing a valid policy, from disputing the value of the property at the time of issuance of the policy, but fraudulent representations of fact, designedly made by insured, relative to the value of property, as an inducement to the contract of insurance fixing the valuation, if believed and acted on by insurer, so as to cause it to issue a policy in excess of the true value of the property at the time, will render the policy void from its inception, and the fraudulent representations may be shown in defense; the words "when taken" implying that the negotiations antecedent to the policy shall be honest and fair as to material matters, to the end that a valid contract as to value may be had. *Held*, by REYNOLDS, P. J., in a separate opinion, that the question of the value of the property destroyed is not open to inquiry, and that a false representation concerning its

cost is not such a fraud as will avoid the policy, in view of the Valued Policy Law (Sec. 7030, R. S. 1909).

2. ———: **Misrepresentation Concerning Cost of Property: Question for Jury.** In an action on a policy insuring the owner of an automobile against loss by fire, *held*, under the evidence, that whether plaintiff, in procuring the insurance, made a false representation concerning the cost of the automobile was a question for the jury.
3. ———: ———: **"Cost:" "Value."** A statement of the actual cost of an article is one of fact, while a statement concerning its value savors more or less of opinion, and, therefore, the overvaluation of property insured must be grossly enormous to admit of any dispute, and a statement of value, if honestly made, will not vitiate the policy.
4. **INSURANCE: "Insurance Brokers:" Agent of Insurer or Insured: Statute.** Sec. 7049, R. S. 1909, declaring that whoever, for compensation, acts in any manner, in negotiating contracts of insurance, for any person other than himself, not being the agent or officer of insurer, shall be deemed an "insurance broker," is a mere general declaration of the law as to the function of an insurance broker, and does not render a broker in every transaction the agent of insured, and, notwithstanding the statute, a broker may become the agent of insurer because of some special condition or circumstance attending the particular case.
5. ———: ———: ———: **Facts Stated.** An insurance broker sought out a buyer of an automobile to procure insurance on it, and presented his card, reciting that he was special agent for a company engaged in the insurance business, which was not the insurance company that subsequently issued the policy. Nothing was said to the effect that he was a broker, or anything other than an insurance agent. Subsequently he returned with a policy, which included insurance against loss by theft and fire and insured refused to accept it, because he wanted fire insurance only. Thereafter he delivered a policy insuring against loss by fire, upon which, after it had been delivered to him by insurer, he stamped his name and a recital that he was "special agent" of insurer. The broker was intrusted by insurer with the underwriting of the policy and was also authorized to deliver the policy and collect the premium and to retain a commission out of the premium as his compensation. In an action on the policy, *held* that the broker was not the agent of insured, but of insurer, and hence insured was not bound by false representations made by the broker to insurer to procure the policy, and this is true notwithstanding the false statement appeared in the policy.

Farber v. American Automobile Insurance Co.

6. ———: ———: ———. A mere insurance broker who is intrusted by insurer with the delivery of a policy and the collection of a premium is the agent of insurer for such purpose, for an insurance broker, as such, has no authority to receive a premium from an applicant for insurance.
7. ———: ———: ———. Where an insurance broker procured a fire insurance policy on an automobile which cost insured \$1427, and indorsed on the policy a statement that the cost was \$2000, and the broker was the agent of insurer in the transaction, insurer was estopped from contradicting the indorsement, although insured accepted and retained the policy.
8. **FIRE INSURANCE: Misrepresentations: Breach of Warranty: "Fact Material to Risk:" Statute.** Sec. 7025, R. S. 1909, providing that the warranty of any fact incorporated in a fire insurance policy, purporting to be assented to by insured, which shall not materially affect the risk, shall be taken as a representation only, does not impair the effect of a warranty pertaining to a fact material to the risk insured against, unless otherwise concluded by some other statute; a "fact material to the risk" in the law of insurance being one which, if communicated to the agent, would induce him either to decline the insurance altogether, or not accept it unless a higher premium is paid.
9. ———: ———: ———: **Breach of Warranty: Effect of Valued Policy Law.** While a representation that an automobile, insured against fire in the amount of \$1750, cost insured \$2000, whereas, in fact, it cost only \$1427, was material to the risk insured against, within Sec. 7025, R. S. 1909, providing that the warranty of any fact in a fire insurance policy not materially affecting the risk shall be deemed a representation only, and was a warranty under a policy stipulating that insured warrants statements made by him to be true, nevertheless, under Sec. 7030, R. S. 1909, which provides that no insurance company shall take a risk on any property at a ratio greater than three-fourths of its value, and, when taken, its value shall not be questioned in any proceeding, the misrepresentation would not defeat a recovery on the policy, on the theory that insured breached a warranty concerning a matter material to the risk, since it is the duty of insurer, under Sec. 7030, to determine the value of the property insured and the amount of insurance to be written thereon, and it is estopped from disputing the value thus fixed, where such value is fixed through a valid contract, free from fraud and deceit in its inception.
- Held*, by ALLEN, J., in a separate opinion, that the misrepresentation was available as a defense, on the theory that insured breached a warranty concerning a matter material to the risk, since, while Sec. 7030 does not permit insurer

to dispute the value of the property at the time of the issuance of the policy, in order to reduce the amount of recovery, nevertheless that section does not render nugatory a warranty otherwise material to the risk merely because it is utilized as a factor in estimating value.

10. **EVIDENCE:** Opinion Evidence: "Value:" "Cost." The value of an article is regarded as the market value—that is, the price it would command in the open market—and is frequently, in the event there is no ready market, a matter of opinion; whereas the cost of an article is the amount which one has paid out for it, and about which he is fully advised and may make a positive statement of fact.

[Reynolds, P. J., dissents in part and Allen, J., dissents in part.]

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

REVERSED AND REMANDED.

Stewart, Bryan & Williams for appellant.

(1) In case of total loss by fire of a second-hand automobile, the valued policy law (Sec. 7030, R. S. 1909) does not preclude the defenses of breach of warranty and fraud in the inducement based upon misstatements as to its cost made by the assured at the time the policy was written. Sec. 6009, R. S. 1879; Sec. 7020, R. S. 1909; *Holloway v. Dwelling House Insurance Co.*, 48 Mo. App. 1; *Lama v. Dwelling House Insurance Co.*, 51 Mo. App. 447; *Maddox v. Dwelling House Insurance Co.*, 56 Mo. App. 343; *School District v. State Ins. Co.*, 61 Mo. App. 597; *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209; *Baxter v. State Ins. Co.*, 65 Mo. App. 255; *Daggs v. Orient Ins. Co.*, 136 Mo. 382; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Aetna Ins. Co. v. Simmons*, 49 Nebr. 811; *Craddock v. Connecticut Fire Ins. Co. (Ky.)*, 169 S. W. 1015; *Johnson v. Reliance Ins. Co.*, 181 Mo. App. 443, 168 S. W. 914; 39 Cyc. 1118; *Kansas City v. Bacon*, 147 Mo. 259; *State v. Doepke*, 68 Mo. 208. (2) In an action on a fire insurance policy for the total loss of a second-hand automobile, the plaintiff must both plead

and prove its value at the time of the loss, as the valued policy law (Sec. 7030, R. S. 1909) only relates to the value of the property at the time the policy is issued. *Green v. Lancashire Ins. Co.*, 69 Mo. App. 429; *Gibson v. Missouri Town Mutual Ins. Co.*, 82 Mo. App. 515; *Gustin v. Concordia Fire Ins. Co.*, 90 Mo. App. 373; *Gustin v. Concordia Fire Ins. Co.*, 164 Mo. 172; *City of De Soto v. American Guaranty, Etc., Ins. Co.*, 102 Mo. App. 1; *Howerton v. Iowa State Insurance Co.*, 105 Mo. App. 575; *Stevens v. Norwich Union Fire Ins. Co.*, 120 Mo. App. 88; *Sharp v. Niagara Fire Ins. Co.*, 164 Mo. App. 473.

James M. Rollins and E. A. Halter for respondent.

(1) The value of the car was fixed by the policy. *Gibson v. Ins. Co.*, 82 Mo. App. 515; *Crosson v. Ins. Co.*, 133 Mo. App. 537; *Hilburn v. Ins. Co.*, 140 Mo. App. 368; *Stevens v. Ins. Co.*, 120 Mo. App. 88; *Ritchey v. Ins. Co.*, 104 Mo. App. 146; Sec. 7030, R. S. 1909; *Daggs v. Ins. Co.*, 136 Mo. 395. (2) The question of fraud and false warranty cannot be raised, the value of the car being fixed by the policy, because of the valued policy law. Secs. 7020, 7030, R. S. 1909; *Daggs v. Orient Ins. Co.*, 136 Mo. 382; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Gibson v. Mo. Town Mutual Ins. Co.*, 82 Mo. App. 515; *Siegle v. Phoenix Ins. Co.*, 107 Mo. App. 456; *Hanna v. Ins. Co.*, 109 Mo. App. 152; *Stevens v. Fire Ins. Co.*, 120 Mo. App. 11; *Crossan v. Fire Ins. Co.*, 133 Mo. App. 537; *Hilburn v. Ins. Co.*, 140 Mo. App. 355; *Surface v. Ins. Co.*, 157 Mo. App. 570; *Burge Bros. v. Ins. Co.*, 106 Mo. App. 244; *Williams v. Merchant's etc., Ins. Co.*, 73 Mo. App. 511. *Spickard v. Ins. Co.*, 164 Mo. App. 1.

NORTONI, J.—This is a suit on a policy of fire insurance. Plaintiff recovered and defendant prosecutes the appeal.

The subject-matter, an automobile, was destroyed by fire about three months after it was insured. The policy was issued and delivered to plaintiff on the seventh day of March, 1912, and by its provisions defendant insured her in the amount of \$1,750 against the loss of the automobile by fire. About three months thereafter, while plaintiff and a party of her friends were riding in the automobile on a country road near St. Louis, it suddenly became enveloped in flame and was totally destroyed. Defendant declined to pay the loss, because, it is said, plaintiff made a false and fraudulent representation material to the risk with respect to the cost of the automobile which induced the issuance of the policy in the first instance, and also because the policy stipulates a warranty in respect of the matter of its actual cost. No written application was executed by plaintiff prior to the issuance of the policy, but a schedule of statements endorsed thereon is invoked and as parcel of this a statement appears therein as follows: "Actual cost to assured, including equipment—\$2,000." It is said that this statement was fraudulently made on the part of plaintiff with a view of inducing the issuance of the policy in the first instance, as a deception practiced to that end, and, moreover, that it constitutes a warranty with respect to a fact material to the risk, in that it appears in the schedule of statements endorsed on the policy, for the policy recites that it was issued in consideration of the premium mentioned and the statements set forth thereon which the assured makes and warrants to be true by accepting the policy.

In its answer defendant sets forth two affirmative defenses, as above stated. The first defense pleaded and relied upon is, that plaintiff made a false and fraudulent representation to defendant, to the effect that the actual cost of the automobile to her was \$2,000, with a view of inducing the issuance of the insurance policy thereon by which indemnity

against fire is vouchsafed in the amount of \$1,750, when, in fact and in truth, the actual cost of the automobile was less than \$1500; also that the fact so misrepresented was material to the risk insured against and that defendant believed and relied upon such statement and issued the policy accordingly. It is, therefore, averred that the policy was void in the first instance because of such fraud in the inducement. In connection with this defense the premium paid is tendered to and deposited in court for plaintiff. The second affirmative defense pleads the same matter as a warranty in respect of a fact material to the risk and avers that defendant is discharged of liability on the policy because of its breach.

The trial court declined to reckon with either of the defenses thus stated and peremptorily directed a verdict in favor of plaintiff for the full amount of the insurance vouchsafed in the policy, in the view that any statement made by the assured concerning the actual cost of the subject of the insurance was unavailing as a matter of defense because of our valued policy statute which becomes parcel of the policy. In other words, the court entertained and expressed the view that, under our valued policy statute, a representation as to the cost of the automobile could be regarded as material to the risk only as a criterion for the fixing of the amount of the insurance to be vouchsafed in the policy and that as the amount of the insurance stipulated is conclusively established, perforce of the statute, as not exceeding three-fourths of the value of the property insured, no representation in respect of that matter may be regarded as material to the risk.

Generally speaking, we believe this view to be sound, in so far as it pertains to a policy issued as a result of fair dealing between the parties and not contaminated in the first instance by fraud, as through deceit practiced by means of misrepresentations relative to the value of the property, which, for that rea-

son, are material as matter of inducement to the contract by which the parties stipulate and agree upon the value of the property, under the influence of the statute. Such representations, falsely made, with a fraudulent intent to influence an over-valuation of the property to be insured, ought to be regarded as material to the risk, if believed by the insurer and relied upon by him in issuing the policy and thus fixing the value by writing the amount of the insurance therein.

The statute (section 7030, R. S. 1909) among other things provides: "No company shall take a risk on any property in this State at a *ratio* greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding." This statute, it has been frequently said, applies to insurance written on personal as well as on real property. It is said that it becomes a part and parcel of every policy of fire insurance issued in the State. It appears to be something more than what is usually regarded as a valued policy statute, in that it carries an inhibition against every insurance company in taking a risk at a ratio greater than three-fourths of the value of the property. Such being true, it estops the insurer, after the issuance of a valid policy, from disputing that the subject-matter of the insurance was of the value, at the time the policy was issued, not only equal to the amount of the insurance written thereon, but one-fourth more, as well. [See *Gibson v. Ins. Co.*, 82 Mo. App. 515; *Stevens v. Ins. Co.*, 120 Mo. App. 88, 96 S. W. 684; *Crossan v. Ins. Co.*, 133 Mo. App. 537, 113 S. W. 704.]

But obviously the statute intends that the contract valuation of the property so fixed by the amount of the insurance written in the policy shall be a valid one. There is nothing in the face of the statute to suggest otherwise, and, indeed, the implication is to the contrary. The statute contemplates and reckons with an insurance company in taking a risk through

issuing its policy on property. In this connection it says, "when taken, its value shall not be questioned in any proceeding." Obviously the words "when taken" imply that the negotiations antecedent thereto shall be honest and fair—that is, free from covin and deceit—with respect to material matters, to the end that a valid contract in respect of such value may be had. Although the question here made was not in decision there, our Supreme Court, in giving judgment upon the validity of our valued policy statute, which pertains to real estate alone, intimated that the question of fraud in the inducement to the valuation fixed remained open—that is, was in nowise concluded thereby. [See *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 395, 38 S. W. 85.] Then, too, in the same case, in the Supreme Court of the United States, the judgment sustaining the statute was predicated in part in this view. In speaking of the parties entering into an insurance contract under the influence of the valued policy statute involved here, the court said:

"It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. Its presumptions cannot be urged against fraud, and it permits the subsequent depreciation of the property to be shown. We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property." [See *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 565.]

It seems to be entirely clear that the statute is designed only to conclude the matter of the value of the subject of insurance stipulated in a policy contract fairly entered into with respect to such valuation. In other words, false and fraudulent representa-

tions of fact, not mere expressions of opinion, designedly made with sinister motive relative to the value of the property as an inducement to the contract of insurance fixing the valuation, if believed and acted upon by the insurer so as to cause the company to issue a policy considerably in excess of the true value of the property at the time, should be regarded not only as material to the risk but sufficient to render the contract void from its inception. In this view, such matter may be shown in defense notwithstanding the valued policy statute. [See *Aetna Ins. Co. v. Simmons*, 49 Neb. 811; *Hartford Ins. Co. v. Redding* (Fla.), 67 L. R. A. 518. See also 1 May on Insurance (4 Ed.), section 30.]

Such is true, too, in respect of a statement concerning the "cost to the insured" of the subject of the insurance, for a representation as to such cost is material to the risk when considered apart from the valued policy statute entirely. This, no doubt, is because of the element of hazard which attends a situation where one may buy an article at a certain price and then insure it for an amount exceeding the price paid in order to destroy it and thus realize a profit. [*Craddock, Vinson & Co., v. Ins. Co.*, 160 Ky. 519, 169 S. W. 1015.] Here, the representation as to the cost of the automobile, if made with a fraudulent intent in order to procure an overvaluation in the policy, as by an overinsurance, is to be regarded as material to the risk, on the issue of fraud in the inducement to the contract fixing the value, for the reason that it antedated the issuance of the policy. The policy is, therefore, free from the influence of the statute and the subject matter of the inquiry is in nowise concluded by its operation on a valid contract of insurance through which the value was fixed and determined. Indeed, the entire defense of fraud above stated penetrates quite beyond the influence of the valued policy statute and operates on the inducement to the contract

by which the value of the property is said to be fixed at its very inception. In this view, the court erred in eliminating this defense by instruction, for there was substantial evidence tending to support it.

But though a statement of the actual "cost" of an article is one of fact, a statement pertaining to the value of any property more or less savors of opinion. Therefore, it is said by Mr. May, in his valuable work on Insurance: "The overvaluation, in the expressive language of Mr. Justice Yeates, must be 'grossly enormous' to admit of any dispute. The statement as to value of property insured is not a warranty but matter of opinion, which, if honestly entertained, does not vitiate the policy." [See 1 May on Insurance (4 Ed.), section 30.]

This court has heretofore expressed a similar view with respect to a representation concerning the value of the property insured, for it is said that while the value is ascertained by the market price, as a general rule statements concerning the value of property savor much of opinion and, therefore, a slight overestimate by the assured of the value of a house should be accounted for rather by a difference of opinion than on the grounds of fraud. [See *Hubbard v. Ins. Co.*, 57 Mo. App. 1, 6, 7.] But though such be true in respect of the statements concerning value, it is otherwise with a statement as to the cost of an article, for such is a fact and in no sense partakes of opinion.

The relevant facts, in so far as the defense of fraud is concerned, will be stated in substance. It appears plaintiff purchased the automobile from one Burns about March first at the price of \$1000. The automobile was a second-hand touring car and it sold originally, when new, for some \$3500 or \$4000. After purchasing the car second-hand from Burns, plaintiff added to it other equipment at an outlay of \$427.46, so it appears at the time the insurance was effected the automobile had actually cost her \$1427.46. Plaintiff

herself testifies to these facts, but she asserts, too, that she made no representation whatever concerning the cost of the car to defendant, nor to Manker, who negotiated the insurance. It appears that Manker was an insurance broker and a friend of Burns, from whom plaintiff purchased the automobile. Burns informed Manker that he had sold an automobile to plaintiff and suggested that he should see her about insurance. Thereafter Manker called at plaintiff's residence and solicited the insurance. Plaintiff did not know Manker and he introduced himself as having been sent by Burns, from whom she purchased the car, to see her about insurance on it. At the same time he gave plaintiff a card bearing his name and words to the effect that he was special agent for the Fidelity & Casualty Company of New York with offices at 308, 314 Rialto Building, St. Louis, Missouri.

There is nothing in the record tending to prove that plaintiff knew Manker was an insurance broker. Manker himself, testifying for defendant, says, "Well, in the first place, I told her that Mr. Burns had sent me over there to insure her automobile." Manker says he did not see the automobile but inquired of plaintiff as to the cost of it and she told him that it had cost her about \$2000; that he made a note of this statement in a memorandum book, called at defendant's office in St. Louis, and communicated the fact to Mr. Crawford, its superintendent, in connection with the proposal for insurance on the car. Plaintiff says that she made no such statement to Manker, but that he went in company with her husband, viewed the car and fixed the value and the amount of the insurance himself. Indeed, plaintiff testifies that Mr. Manker seemed to know all about what the car had cost her and congratulated her on the bargain, as if he were apprised of the purchase price through his friend Burns, who had suggested that he solicit the insurance on it. At any rate, Manker departed and in a day or

two returned to plaintiff's residence with a policy of insurance against fire for \$1750, but including also insurance on the automobile against theft. Plaintiff declined to accept this policy because she had not contemplated insuring it against theft and Manker departed but returned thereafter with the policy now in suit, issued by defendant at \$1750 insurance on the automobile against fire, and delivered this policy to her. On the back of the policy, at the time of its delivery to plaintiff, appeared Manker's name, as follows, affixed by the impression of a rubber stamp: "H. E. Manker, special agent, 314 Rialto Building, St. Louis, Missouri."

On delivery of the policy, plaintiff paid Manker the premium of \$43.75, and it appears conclusively that Manker paid this amount to defendant for the policy, less his commissions of twenty per cent, which defendant allowed him to withhold as his compensation. Manker testifies that he is, and was then, an insurance broker and had no commission of authority or an appointment from defendant as its agent. Also it appears from the testimony of Manker and defendant's superintendent that Manker's name as special agent was not on the policy when delivered to him by the insurance company, but that he affixed it by means of a rubber stamp afterwards and before delivery to plaintiff. It appears, too, that Manker placed insurance frequently with defendant, and, indeed, its superintendent, Crawford, who wrote the policy, testifies that he was in the office of defendant placing insurance with them on an average of once a week, and that it was the custom to pay him twenty per cent commissions—that is, Manker deducted such percentage of commissions from the premium collected by him on the delivery of policies. Furthermore, Crawford, the defendant's superintendent, says that he sent no one to inspect the car, but accepted the risk on his recommendation because he knew Manker. "We deal only with brokers that we know. Now, it is a matter of honor among insurance

men that a reputable broker, a man whom we will deal with, will not misrepresent a risk deliberately, and they come into the office and we ask them, or they give us the information that we want, and we rely upon what they give us."

The case is presented and argued throughout on the theory that Manker, insurance broker, was the agent of plaintiff in effecting this insurance, and that his representation to defendant's superintendent, Crawford, who approved the risk at the time the policy was issued, that the automobile actually cost \$2000 was a representation made by plaintiff through her agent, and she is, therefore, responsible for it. Of course, if plaintiff made such representation to Manker with a view of overinsuring her property and he communicated it to the defendant, she is responsible therefor whether Manker was her agent or the agent of the company; but she says she made no such representation, while he says she did.

However, the argument proceeds as though Manker is plaintiff's agent merely because of the fact that he was an insurance broker and that this is true as a matter of law, but we are not so persuaded. Even though Manker is an insurance broker and follows that calling, it is entirely clear that there is no evidence in this record revealing him to be in law the agent of the insured. It is equally clear that, on the conceded facts of the case, Manker was the agent of defendant, not only for the purpose of delivering the policy and collecting the premium thereon, but even more, when the acts of ratification are viewed.

It is true our statute (section 7049, R. S. 1909), requiring insurance brokers to take out license, declares that "Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for any person other than himself, and not being the appointed agent or officer of the company in

which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section, etc." But this is a mere general declaration of the law as to the function of an insurance broker and does not render him in every transaction the agent of the insured, for the facts attending the negotiations determine for whom he is acting. Notwithstanding the statute, a broker may become the agent of the insurer because of some special condition or circumstance attending the particular case. [See *Pringle v. Aetna Life Ins. Co.*, 123 Mo. App. 710, 101 S. W. 130; 1 May on Insurance (4 Ed.), section 124.]

Here, it is certain plaintiff did not deal with Manker as a broker. She did not seek him out and appoint him to act for her, but rather he called at her residence, ostensibly as an insurance agent, and in his own language stated that he had been sent at the behest of Burns "*to insure her automobile.*" He gave plaintiff his card which recited that he was special agent for a company engaged in the insurance business, though not this defendant. Nothing was said to the effect that he was a broker or anything other than an insurance agent as he appeared to be and it is manifest plaintiff dealt with him as such. Subsequently he returned with a policy which appeared to include insurance against theft as well as fire, and plaintiff declined to accept this, for the reason that she had not applied for insurance of that character. Obviously, in respect of this matter, Manker was acting for some one other than plaintiff, for he tendered a policy different and distinct from that for which she had applied and one which would naturally require an additional premium. It does not appear as to whether Manker's name as agent was on the first policy tendered or not, but, be that as it may, he returned the first policy to the company and delivered another, insuring against fire only,

in accordance with plaintiff's original request, and on this policy his name appeared affixed by means of a rubber stamp, as special agent for defendant company, though the evidence is, this was not done in the insurance company's office, but after the policy had been delivered to Manker. However plaintiff did not know this. All of these facts suggest that Manker approached plaintiff as an insurance agent, authorized to effect insurance for an insurance company, and there is not a word in the case to suggest that she gave him general authority about placing the insurance. Moreover, on delivering the policy, plaintiff paid him the premium in full for the company. Then, too, according to Crawford, the company billed the policy to Manker, as if he, and not plaintiff, was its debtor for the premium.

It is certainly clear that there is nothing in the facts above stated suggesting that plaintiff employed an insurance broker to act as agent for her. In respect of a very similar situation, Judge BREWER, subsequently Mr. Justice BREWER of the Supreme Court of the United States, said:

"It seems to me, from whichever standpoint you approach this case, that it would not be fair to release the defendant company from liability. The plaintiff did not go to an insurance broker to employ him to solicit insurance. He never thought of employing an agent to act for him; but he, as principal, wanting to buy insurance, went to a man who was selling insurance, and proposed to buy from him \$20,000 worth of insurance. Judge Ames proposed to sell it to him, and they each stood in the relation of principal in that negotiation." [May v. Western Assur. Co., 27 Fed. 260; see also McGraw v. Ins. Co., 54 Mich. 145.]

So it is here. These parties at that time stood in the relation of principals. Plaintiff and Manker were strangers to each other, having had no previous dealings whatever, and this being true, the presumption

which attended the situation at the time, in view of the representations made by Manker, is that he was an agent representing an insurance company which desired to negotiate with her. It is certain plaintiff did not employ him as an insurance broker to represent her. So far as this record discloses, she never thought of employing Manker to act as her agent. This much may be said concerning the original negotiation touching the insurance, and, as the matter progressed, the character of Manker as an insurance agent, in contradistinction from an agent for plaintiff, was more highly developed. He first tendered her a policy for which she had not applied, as if he desired to sell it, and this she refused. Immediately thereafter he delivered plaintiff an insurance policy the one now in suit, bearing his name as special agent and also collected the premium thereon from plaintiff for the company. Obviously this appeared to confirm his authority as by ratification. Such is the situation when viewed from the standpoint of plaintiff, and it is clear Manker was not her agent.

We look now to his negotiations and conduct from the standpoint of defendant. Manker was entrusted by defendant to deliver the insurance policy and collect the premium thereon, and out of such premium he was paid as his compensation a commission of twenty per cent. He was not the agent of plaintiff, and it is important to inquire: Whom did he represent in this transaction? The question is to be answered by reference to the proprietary interest in the policy and the moneys collected thereon, with a view of ascertaining who it was reposed trust in him with respect of that matter. To whom did the policy belong until delivered to plaintiff? The answer is, to defendant. When payment was made by plaintiff to Manker for the policy, to whom did the moneys thus collected by him belong? Such moneys, of course, belonged to defendant, and he collected for it. Out of moneys thus received by

defendant Manker received his compensation. In respect of this matter there can be no question concerning the fact that Manker was the agent of defendant for the purpose of delivering the policy and collecting the premium thereon, though it may be that his agency does not extend beyond this, on these facts alone.

This court has heretofore declared that a mere insurance broker, as such, is without authority to receive a premium from an applicant for insurance. [See *Gentry v. Ins. Co.*, 15 Mo. App. 215.] The authorities rule, too, without dissent, that a mere insurance broker who is entrusted by the company with the delivery of the policy and the collection of the premium is to be regarded as the agent of the company for such purpose. [See *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177; *Gaysville Mfg. Co. v. Phoenix Ins. Co. (N. H.)*, 36 Atl. 367; *Estes v. Home, etc. Ins. Co. (N. H.)*, 33 Atl. 515; *Monitor Ins. Co. v. Young*, 111 Mass. 537; *Farmers, etc. Ins. Co. v. Wiard*, 59 Neb. 451.] If, then, Manker was not the agent of plaintiff and represented himself to her as an insurance agent, which representation during the transaction subsequently appeared to her to be ratified by the defendant company through the delivery of its policy and the collection of premium by Manker, whose agent should he be regarded, in the matter of making the representation said to be false—that is, in event it be found plaintiff made no such representation to him? If plaintiff neither made such representation to him nor authorized him to make one for her, then the representation is, of course, in nowise binding upon her. It may not be imputed to her, through an agency on the part of Manker, for such does not appear.

It would seem, therefore, if plaintiff did not make it, that in respect of this representation Manker was acting for the insurance company, rather than the plaintiff, because the insurance company was accus-

tomed to deal with him and pursued an established custom of trusting to representations made by him. Indeed, Mr. Crawford, the superintendent of defendant, testified that Manker was in his office on an average of once a week and frequently placed business with the company, also that the company made no examination of the property on which it placed insurance because it trusted to the representations made by brokers, such as Manker, who were well known to it. The reposing of trust and confidence in respect of a particular subject-matter in a transaction of this character inheres with an agency thereabout, and if insurance companies see fit to trust brokers concerning such matters, when, as here, the broker is not the agent of another, they should bear the burden thus voluntarily assumed. Especially is this true when the custom is considered, which obtains between the company and certain brokers, of whom Manker is one and about whom Mr. Crawford testified. In such circumstances, the company having made the broker its agent for the purpose of delivering the policy, collecting the premium, compensating him for the service by an allowance of commission, and moreover established and pursued a custom in accepting the representations of the broker as to such material matters concerning the property insured, the broker is to be regarded as the agent of the insurance company thereabout, in cases such as this one, where it is entirely clear that he is in no manner the agent of the insured. [May v. Western Assur. Co., 27 Fed. 260; Queen Ins. Co. v. Union Bank & Trust Co., 111 Fed. 697; Lehmann v. Ins. Co., 183 Mo. App. 696, 167 S. W. 1047; Indiana Ins. Co. v. Hartwell, 123 Ind. 177.]

In the circumstances appearing in this record, the representation as to the cost of the automobile, if not made at all to Manker, must be regarded as a representation of the agent of the insurance company and one for which plaintiff is in nowise responsible. [See

McGraw v. Ins. Co., 54 Mich. 145; Lehmann v. Ins. Co., 183 Mo. App. 696, 167 S. W. 1047.] Then, too, if it be that Manker was informed of the true cost of the car, as plaintiff says he was (for, according to her testimony, he seemed to know all about it and congratulated her on the bargain), and, notwithstanding this knowledge, procured the policy to be issued by defendant, without any representation as to its cost on the part of plaintiff, the statement of the actual cost of the car to be \$2000 on the schedule of statements endorsed on the policy is to be regarded as that of the company with full information, and it is estopped to assert the contrary. This is true, too, though it appears in the policy, which she accepted and retained. [See Williams v. Bankers' etc. Ins. Co., 73 Mo. App. 607; Shell v. Ins. Co., 60 Mo. App. 644, 649; Farmers' etc. v. Wiard, 59 Neb. 451; Combs v. Hannibal, etc. Ins. Co., 43 Mo. 148; Ormsby v. Ins. Co., 105 Mo. App. 143, 79 S. W. 733.]

We come now to consider the question of warranty under the influence of our valued policy statute. According to the terms of the policy, it stipulates a warranty on the part of plaintiff to the effect that the actual cost of the automobile was \$2000, whereas, in truth and in fact, it appears beyond question, in plaintiff's evidence, that such actual cost was \$1427.46. The defense of breach of warranty proceeds according to the conception of a valid contract between the parties, for plaintiff is suing on the policy and defendant invokes the covenant of warranty in defense. In this the subject-matter in judgment is to be distinguished from the proposition advanced as a matter of fraud in the inducement at the inception of the contract and before it was entered into. The warranty asserted is affirmative in its character, in that it stipulates the automobile cost plaintiff \$2000, and the important question for consideration is as to whether it pertains to a fact material to the risk, in view of the statute

fixing the amount of the insurance stipulated in a valid subsisting contract of insurance between the parties as three-fourths of the value of the property at the time. Formerly the law required literal compliance with a warranty of fact, whether material or not, in an insurance contract, and for the breach of such avoided the policy, but this rule no longer obtains, for the statute (section 7025, R. S. 1909) provides otherwise. By the provisions of that statute, the warranty of any fact or condition incorporated in a policy of fire insurance, purporting to be assented to by the assured, which shall not materially affect the risk insured against, shall be deemed and taken as a representation only, in a suit on the policy. Though this statute serves to annihilate the force of a warranty at common law touching immaterial matters, it in nowise impairs the effect of a warranty pertaining to a fact material to the risk insured against, which is otherwise not concluded by some other statute—that is, remains open as a competent subject of contract and a warranty in respect of such fact in such cases inheres with like force and effect as attended them prior to the statute. [See *Dolan v. Ins. Co.*, 88 Mo. App. 666; *Kenefick v. Ins. Co.*, 205 Mo. 294, 103 S. W. 957.] A fact material to the risk, in the law of insurance, is said to be one which, if communicated to the underwriter, would induce him either to decline the insurance altogether or not to accept it unless a higher premium is paid. [See *Boggs & Leathe v. Ins. Co.*, 30 Mo. 63, 68. See, also, 1 May on Insurance (4 Ed.), section 184.]

There can be no doubt that a representation of fact to the effect that the automobile cost \$2000 should be regarded as material to the risk insured against, ordinarily and, therefore, a warranty in the policy in suit and as such available to defendant, even under our statute above quoted, if the question were to be considered separate and apart entirely from our valued policy law. Indeed, such a representation has been

determined to be material to the risk by the Kentucky court, but the valued policy law, if any obtains in that State, does not appear to have been reckoned with thereon. [See *Craddock, Vinson & Co. v. Ins. Co.*, 160 Ky. 519, 169 S. W. 1015.]

However this may be, a false statement of fact, which operates only to induce the amount of the insurance, may not be regarded as a warranty, in view of our valued policy statute, when considered apart from fraud entirely as essential to the conception here. The statute (section 7030, R. S. 1909) provides no company shall take a risk on any property in this State at a ratio greater than three-fourths of the value of the property insured, and when taken its value shall not be questioned in any proceeding. This statute not only renders the insurance contract subordinate to its provisions but it becomes parcel of the policy as if expressly stipulated therein. [See *Havens v. Ins. Co.*, 123 Mo. 403, 27 S. W. 718.] In view of the statute and its so becoming parcel of the policy, it has heretofore been determined that any representation stipulated in the policy to be a warranty of fact with respect to the value of the property is to be disregarded as immaterial to the risk, in that such is not open, that is, subject to, a contract of warranty. This must be true because the valued policy statute, fixing the insurable value, is parcel of the contract of insurance and the matter of a warranty arises only on a valid and subsisting contract between the parties by which such value is determined. The law, having fixed the value of the property by reference to the amount of insurance written in the policy, manifestly it will not tolerate a stipulation in the same contract, such as a warranty pertaining to value designed to thwart the purpose of the statute and one which makes for the undoing of the value solemnly ascertained and agreed upon in the policy. The statute above quoted is not only a valued policy law but it carries as well an inhibition against

an insurance company issuing an insurance policy on property to exceed three-fourths of its value. It proceeds in the view that the insurer shall go out and investigate the value of the property himself and determine the matter as to the amount of insurance which should be written thereon, not exceeding, however, three-fourths of its value. It is true the insurer may neglect to do this and thus carelessly contract to indemnify for a valuation beyond what he would otherwise do. If so, he is treated as estopped from thereafter disputing the value placed upon the property, where such valuation has been attained through a valid contract free from fraud and deceit, as pointed out above. That such is the view of the purport of the valued policy law is not open to question. [See *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 395, 38 S. W. 85; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 565.]

Therefore, though an insurer may set up a fraudulent valuation in the inducement of the contract going to the value, such representation or statement of fact, pertaining to the value is annihilated as a fact material to the risk, perforce of the valued policy statute, in contracts of insurance fairly made, and a stipulation in the policy with respect of that matter is to be disregarded for that reason—that is, for the reason that such fact going to the value which the insurance company is required to determine for itself may not be regarded as material to the risk after a valid policy is issued fixing such value. [See *Williams v. Banker's etc. Ins. Co.*, 73 Mo. App. 607; *Ritchey v. Home Ins. Co.*, 104 Mo. App. 146, 78 S. W. 341.]

But it is argued the statement of fact that the actual cost of the automobile to plaintiff was \$2000 is something different and distinct from a statement of its value. Touching this it is said the value of an article is regarded as the market value—that is, the price it would command in the open market—and is frequently, in event there is no ready market, a matter of opin-

ion, whereas the cost of an article is the amount which one has paid out for it and about which he is fully advised and may make a positive statement of fact. There can be no doubt that such is an accurate statement of a clear distinction. But though such be true, the matter of the cost of the automobile to plaintiff, in any view of the case, is to be regarded within the influence of the valued policy statute, for the argument is, that defendant would not, under any circumstance, issue a policy for an amount exceeding the cost price of the article insured. If such be true, then the inquiry as to the cost and the statement with respect to it pertains solely to the amount of the insurance to be written. The amount of the insurance under our valued policy statute may not exceed three-fourths of the value of the property insured in every situation, whether such be true or not as a matter of fact, and is to be so taken and reckoned with where the case concedes the policy to be a valid and subsisting one, as is essentially the predicate for an argument based on a warranty contained in the contract. In this case, by the fact of issuing the policy for \$1750, the defendant affixed a value on the automobile equal to that sum of which \$1750 is three-fourths—that is, \$2,187.50. But this is not important at the moment. According to the argument, if defendant had known the true cost of the automobile, it would have treated such cost as a material fact by declining to write a policy in the amount it did—that is, for the value according to the stipulation of the policy as influenced by the statute. Obviously then, the matter of fact pertaining to the cost is material to the risk only in so far as it would influence defendant's course in declining to write such amount of insurance on the automobile and thus ascribing the value imparted as a result of the transaction. This being true, the warranty, though in respect of a fact material to the risk ordinarily, is concluded as unavailing—that is, immaterial under the valued policy law. In so far as this

question is concerned, we agree with the views of the trial court thereon.

But for the reason the court peremptorily disposed of the defense relating to fraudulent representations going to the inducement to the contract by which the value of the property was fixed, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, concurs in all that is said in the opinion on the question of agency and likewise in what is said and the conclusion that the matter of breach of warranty may not be regarded as material to the risk, under our statute, but dissents from the conclusion reached on the matter first discussed—that is, that the valuation of the property may be challenged on the ground of fraudulent representation going to the inducement of the contract. *Allen, J.*, concurs in what is said and the conclusion reached in the opinion touching the matter of fraudulent representations in the inducement of the contract of insurance fixing the value of the property, and expresses no opinion on the question of agency, but dissents from the conclusion on the question of breach of warranty. Each files a separate opinion.

SEPARATE OPINION.

REYNOLDS, P. J.—I agree to the reversal but with grave doubt as to whether that should be the order. I am very strongly inclined to think that a misrepresentation as to the cost of the machine is not such a fraud as goes to affect the amount insured and paid for, or that under our valued policy law this is a misstatement or misrepresentation of which, under that law, the insurer can avail itself. Cost is not the measure of value. Insurance is made on value, not on cost. It was open to the insurer to ascertain value—it was bound to do so and had no right to rely for that value on the statement of the insured as to cost, if

she made one, and that is disputed, but was bound itself to determine value, that is the amount for which it would insure and on which it charged and collected its premium. Having insured at a stated valuation for a stated amount, and charged its premium on that valuation, it is bound, under our law, in that amount. Logically, I should not agree to a reversal. On a new trial that issue may disappear if the jury finds that the insured made no representation as to cost. I agree to a reversal and remander merely that there may be a disposition of the case by our court. In doing so, I do not agree that the value is open to inquiry or that the statement of cost, even if made, is such a fraud as avoids the policy. On all the other points so thoroughly covered by my Brother NORTON, I am in entire agreement with him.

SEPARATE OPINION.

ALLEN, J.—I am unable to concur in all that is said by my Brother NORTON in the opinion written by him herein. I agree with what is said to the effect that there was evidence tending to show a false representation by plaintiff of a material fact, as an inducement to the issuance of the policy, sufficient to take that question to the jury; and that in any event it was error to give the peremptory instruction for plaintiff. But I am not prepared to agree with the view expressed as to the effect of the statement in the policy as to the cost of the automobile.

If it be true that the effect of sections 7024 and 7025, Revised Statute 1909, is to leave warranties which pertain to matters material to the risk just where they were at common law and the cases so hold (see *Dolan v. Insurance Co.*, 88 Mo. App. 666; *White v. Insurance Co.*, 93 Mo. App. 282), then the statement contained in the policy accepted by plaintiff, that the automobile cost \$2000, and which by the terms of the

policy plaintiff warranted to be true, is to be regarded as a warranty, if it pertains to a matter material to the risk. That it does pertain to a matter material to the risk I think is undoubtedly true, as a matter of law (see authorities, *supra*), and it seems to me that the matter involved is one material to the risk wholly apart from the question of the *value* of the property insured, and that hence the warranty in the policy does not become inoperative because of the effect of the valued policy statute. This statute does not permit the insurer to dispute the value of the property (at the time of the issuance of the policy) in order to reduce the amount of the recovery; but I take it that this does not mean that a warranty as to a matter otherwise material to the risk is rendered nugatory for the reason alone that it is utilized as a factor in estimating value.

My Brother NORTON's opinion proceeds upon the theory that the statement as to *cost* pertained solely to *value*, because it affected alone the amount for which the policy would be written. I think, however, that this is a *non sequitur*. The cost of an article is quite a different thing from its value. What it cost is a definite fact, whereas its value is a matter of opinion. The supposed cost of an automobile may be, and evidently in this case was, one of the factors reckoned with in arriving at its supposed value; but while this is true, it is also true that the cost is a matter material to the risk, regardless of the use thereof in determining the value. Whatever may have been the reasonable market value of this automobile, the evidence goes to show that defendant would not have issued this policy had it known the truth as to its cost; and it may be readily assumed that no insurer would issue a policy upon a second-hand automobile for more than the insured paid for it, and this regardless of its value; for such a practice would tend to encourage arson, or at least negligence in handling the thing insured, since it would pro-

vide a ready market for second-hand automobiles. Though this automobile may have been in fact of much greater value, it does not follow that defendant would have issued this policy, no matter how great the value might have appeared to be, had it known that the insured paid only \$1200 for it, and put upon it \$427.46 in extra equipment. Apart entirely from the value of the thing insured, to issue a policy to the insured for more than the property cost the latter, introduces an element into the hazard taken by the insurance company which materially affects the risk. It is said here that while the cost and the "model" of the automobile were both considered in arriving at the putative value, nevertheless no matter what the value might appear to be the limit of the insurance would always be the cost.

I do not understand the defendant here to question the value of the property, at the time of the issuance of the policy. But I understand defendant's argument to be that a warranty as to cost is a warranty material to the risk regardless of what the value may be, because of the fact that to issue a policy for more than the cost would be to greatly increase the hazard, particularly in insurance of this character.

There are other questions involved as to which I express no opinion at this time. I concur in reversing the judgment and remanding the cause, in order to dispose of the case before us.

**BOECKELER LUMBER COMPANY, Appellant, v.
WILLIAM WAHLBRINK et al., Respondents.**

St. Louis Court of Appeals. Argued and Submitted April 7, 1915.
Opinion Filed May 4, 1915.

1. **PRINCIPAL AND AGENT: Existence of Agency: Conflicting Instructions.** Where the question of whether an agency was created was a material issue, the giving of conflicting instructions, one of which declared that the agency existed, as a matter

Boeckeler Lumber Co. v. Wahlbrink.

of law, and the other of which submitted that question to the jury for determination, was reversible error.

- 2 **INSTRUCTIONS: Conflicting Instructions.** The giving of conflicting instructions on a material issue is reversible error.
3. **MECHANICS' LIENS: Estoppel: Principal and Agent: Husband and Wife: Agency of Husband.** A husband entered into a contract for the erection of a house on his wife's lot. The husband and wife lived at premises adjoining the lot on which the house was erected, and the wife was on the lot many times while the house was being erected, and knew that it was intended for their home. The husband borrowed money to erect the house, to secure which the wife and husband pledged a deed of trust on the property, executed by them; the wife knowing that the proceeds of the loan were to be used in completing the house. The wife did not authorize the husband to build the house, and told him that she objected to his doing so, but did not make her objection known to anyone else. In an action to enforce a mechanic's lien against the house and lot, for material used in constructing the house, and not paid for, *held* that the wife was estopped, as a matter of law, from denying the agency of her husband, and hence her property was subject to the mechanic's lien.
4. ———: **Estoppel: Estoppel of Lienors by Silence.** In an action to enforce a mechanic's lien for material used in the construction of a building, it appeared that an officer of plaintiff corporation, when asked by the owner whether the contractor owed it any money for material furnished for the building, answered that the contractor owed it some money, he thought, but that he did not know whether or not it was on the building in question, and that he would look the matter up and let the owner know. The owner then told plaintiff's officer that he was going to settle with the contractor "by a certain date," and would deduct whatever was owing plaintiff, if anything, for material that had not been paid for. About ten days thereafter, not having heard from plaintiff, he settled with the contractor; but whether or not that was within or after the date specified in the conversation with plaintiff's officer was not shown. *Held*, that the court should have instructed that, as a matter of law, plaintiff was not estopped from maintaining the action, on the theory that it was silent when it was under duty to speak, since plaintiff was not misled to his prejudice into the belief that the contractor was not indebted to plaintiff for material furnished for the building.
- Held*, by NORTONI, J., dissenting, that whether plaintiff was estopped by silence, was a question for the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED AND REMANDED (*with directions*). CERTIFIED TO SUPREME COURT.

Schulenburg & Diehm for appellant.

The courts all concur in this, that no man can set up another's act or conduct as the ground of estoppel, unless he has himself been misled or deceived by such act or conduct; nor can he set it up when he knew or had the same means of knowledge as to the truth of the statement as the other party. The primary ground of the doctrine is that it would be a fraud on the party to assert what his previous conduct had denied, when on the faith of that denial others have acted. If the truth be known to both parties or they have equal means of knowledge, there can be no estoppel. *Bales v. Perry*, 51 Mo. 449; *Spurlock v. Sproule*, 72 Mo. 503; *Acton v. Dooley*, 74 Mo. 63; *Blodgett v. Perry*, 97 Mo. 263; 10 Am. Stat. Rep. 307; *Shields v. McClure*, 75 Mo. App. 631. To make the silence of a party operate as an estoppel, the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence. 16 Cyc. 759; *Anderson v. Baumgartner*, 27 Mo. 80; *Farley v. Peters*, 5 Mo. App. 262; *Cantley v. Morgan*, 51 W. Va. 304; *Gregmoore Orchard Co. v. Gilmour*, 159 Mo. App. 204; *Knoedler v. Glaenzer*, 55 Fed. 895; *Taylor v. Ely*, 25 Conn. 250. In the absence of expressly proved fraud, there can be no estoppel based on the acts or conduct of the party sought to be estopped when they are as consistent with honest purposes and with absence of negligence as with their opposites. *Standard Sanitary*

Mfg. Co. v. Arrot, 135 Fed. 750 (affirming 131 Fed. 457); Victor Talking Mach. Co. v. American Graphophone Co., 190 Fed. 1023 (affirming 189 Fed. 359); Brant v. Coal Co., 93 U. S. Sup. 335; 1 Story Equity, 391; Hequemborg v. Edwards, 155 Mo. 514. A waiver is where one in possession of any right, whether conferred by law or by contract and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and is precluded from claiming by reason of it afterward. Bishop on Contracts, sec. 79; Williams v. Railroad, 153 Mo. 487. Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights and fails to assert his title or right, he will be estopped afterward to assert it; but it must appear that it was his duty to speak and that his silence or passive conduct actually misled the other to his prejudice. 16 Cyc. 761; Price v. Halley, 138 Mo. 561; Oliver v. Beard, 72 Mo. App. 181; State v. Stead, 65 Mo. App. 487; Dameron v. Jamison, 143 Mo. 483; Ingalls v. Ferguson, 138 Mo. 358; Bright v. Miller, 95 Mo. App. 270; Mivalaz v. Genovely, 28 Ky. Law 203, 89 S. W. 109.

Henry G. Trieseler for respondents.

(1) The answers of defendants, Alfred A. Eicks and Cass Avenue Bank, allege every essential element of an estoppel *in pais*. The evidence abundantly established the facts alleged. The instructions properly submitted the issues to the jury. Lumber Co. v. Park Association, 64 Mo. App. 377; Brick Co. v. Sadring, 68 Mo. App. 15; Chilton v. Lindsay, 38 Mo. App. 57; Konta v. St. Louis Stock Exchange, 189 Mo. 26; St. Louis Safe Deposit Co. v. Kennett Est., 101 Mo. App. 370; Jaicks

v. Merrill, 201 Mo. 91; Schenrich v. Light Co., 109 Mo. App. 406; Riley v. Insurance Co., 117 Mo. App. 235; Pelkington v. Insurance Co., 55 Mo. 172; Leather Manuf'rs Nat'l Bank v. Morgan, 117 U. S. 96; Bigelow on Estoppel, p. 570. (2) Silence constituted an element of estoppel as much so as a direct representation or an act of omission. Bigelow on Estoppel, pp. 583-584; Jaicks v. Merrill, 201 Mo. 109; Riley v. Insurance Co., 117 Mo. App. 235; Pelkington v. Insurance Co., 55 Mo. 172; Konta v. St. Louis Stock Exchange, 189 Mo. 26; St. Louis Safe Deposit Co. v. Kennett Est., 101 Mo. App. 370. (3) Appellant was under a legal obligation and duty to speak, and its failure or refusal to do so and make its claim and demand known within a reasonable time to defendant Alfred A. Eicks completed the chain of facts or elements constituting an estoppel *in pais* and casts the loss on appellant. (a) Because appellant can have no lien unless there is in existence a contract between the owner and contractor for the erection of the building or improvements. Waldemeyer v. Loebig, 183 Mo. 363; McGuinn v. Federated Mines & M. Co., 141 S. W. 467; Louisiana & Gulf Lbr. Co. v. Myers, 87 Mo. App. 671. (b) Appellant and respondents (defendants), by virtue of the contract between Alfred A. Eicks and the contractor, Wahlbrink, stood in privity of contract which cast mutual obligations and duties upon all respecting matters pertaining to the building or parties connected therewith. St. Louis to use of Supply Co. v. Construction Co., 175 Mo. App. 556; Board of Education v. Fidelity Co., 155 Mo. App. 121; Board of Education v. Fidelity Co., 166 Mo. App. 422; Glencoe Co. v. Von Phul, 133 Mo. 561; Glencoe Co. v. Wind, 88 Mo. App. 163. (4) A waiver of a mechanic's lien is to be determined by all the facts and circumstances at the time the waiver occurred, not at the time the lien is filed or suit brought. It is, in fact, a question of intention. Rand v. Grubbs, 26 Mo. App. 591; Gorman v. Saguer, 22 Mo. App. 137;

Ridge v. Mercantile Co., 56 Mo. App. 155. (5) Appellant had knowledge that Alfred A. Eicks was about to settle and pay the contractor, Wahlbrink; was notified to present its claim, if it had one; it failed to do so; it permitted Alfred A. Eicks to pay over the money to the contractor and acquiesced in the settlement with the contractor. These facts and the attending circumstances in evidence constitute a waiver by appellant. Rand v. Grubbs, 26 Mo. App. 591.

REYNOLDS, P. J.—This is an action to enforce a mechanic's lien upon a building and the lot upon which it stands, the action being against one Wahlbrink, the original contractor, and Mathilda J. Eicks and Alfred A. Eicks, husband and wife, as owners of the property and contractors with Wahlbrink for the erection of the house, as also against the trustee and beneficiaries in a deed of trust placed upon the property after the commencement of the work on the building. At a trial of the cause in the circuit court, there was a judgment against the contractor Wahlbrink but in favor of Mr. and Mrs. Eicks and the other defendants claiming under the deed of trust. From this judgment plaintiff prosecuted its appeal to our court. The cause was argued and submitted and our court reversed the judgment and remanded the cause for failure of the trial court to hold, as a matter of law, that Mrs. Eicks was estopped under the facts in evidence from denying the agency of her husband in contracting for the erection of the building, we holding that the matter of agency of the husband under the facts in evidence was not a question *in pais* on which the jury might find one way or the other but that on the facts the agency should have been declared by the court as a matter of law. We further held that there was evidence tending to prove an estoppel against plaintiff by reason of its silence, and that whether the defendant owners were justified in relying upon that silence

and acting upon which in making payment to the contractor when the materialmen had not been paid, was a question of fact that should be submitted to the jury. Both parties filed motions for rehearing. That of the respondent challenged the correctness of our holding that the court, under the facts in evidence, should have declared as a matter of law that the agency of the husband was established, while counsel for appellant claimed that we were in error in holding that there was evidence for the consideration of the jury on the estoppel claimed against the plaintiff, arguing that under the facts, the court should have held, as a matter of law, that there was no estoppel. We will consider both propositions.

The lien here sought to be enforced is for a balance claimed as due for material, there being no controversy over the amount, or that the material went into the construction of the building, and that due steps had been taken for its enforcement against the house and lot. Nor was it denied that the other defendants, the Cass Avenue Bank, its trustee and the present holder of the notes hereafter referred to, held under a deed of trust placed upon the property while the work of construction of the house was in progress.

The first proposition for consideration is the fact of agency of the husband for his wife in the erection of the building.

It appears that the husband contracted in writing and in his own name with Wahlbrink on June 10, 1909, for the erection of this building on a lot owned by his wife, and the contractor thereupon entered upon the work of construction. Mr. Eicks had some money on hand at the time but not sufficient to complete the building. Apparently toward the close of August, 1909, he had drawn practically all of his money out of the Cass Avenue Bank, where he kept his deposit, and on August 31, 1909, he executed his individual note to that bank apparently for \$3800, discounting this for \$3686,

that amount then being placed to his credit with the bank. He appears to have used practically all of this amount in the completion of the house, paying the larger part of it to Wahlbrink direct, some of it to parties who it seems had done work or furnished material in the construction of the house. As collateral security for this individual note Mr. and Mrs. Eicks put up with the bank a deed of trust executed jointly by them on this lot, securing a principal note for \$3800, payable three years after August 27, and six semiannual interest notes. While Mrs. Eicks testified that she had not authorized her husband to build this house on her lot, and while both of them testified that she had objected to her husband building the house, it appears affirmatively that Mrs. Eicks knew that this money which had been borrowed by her husband was for the purpose of completing the erection of the house on her lot; that she was on the premises, she and her husband living on the lot adjoining it, many times during the course of the erection of the building; in short, knew that the building was being constructed on this lot for the purpose of occupancy by her and her husband as a family residence. It does not appear that the husband had any interest in the lot, so as a matter of law when the building was erected it was of the property of the wife, nothing appearing to the contrary. Nor does it appear that the objection of Mrs. Eicks to the location of the building was ever made to any one other than her husband.

The wife testified that she "did not bother" about the details of the construction of the house; that she knew after it was started that it was on her land and that it was also to be a home for her afterwards; that she "never bothered" about the details of the building; knew that the building was to be for their common use as a dwelling. She went with her husband to the bank to sign the notes and deed of trust, knowing that they were to be used to raise money to finish the building.

Her husband told her that that was the purpose for which he was raising the money and she made no objection to pledging her property, this house and lot, the title in her name, to the bank to raise this money; that she let her husband take the money from the bank to complete the building she saw was going up next door to their home; that she signed the deed of trust at her husband's request and was willing to do it at the time and knew that the house was to be her home, but as to any arrangement of detail in respect to the house or its building, she had nothing to do. Asked if she had ever gone down to pick out things for the house, she answered that she went down town with her husband once when he selected the mantels because he asked her to go along with him; her husband asked her if she would go, she said she would, and went with him. Asked if she knew what this house was being built for and for what purpose, she answered, "Sure, I knew. I knew we were going to live in it. I knew he was building it and knew it was to be our home. Q. He never asked you about a detail or alteration or consulted you? A. Not that I know of, no. Q. You knew that the building was being built as your residence, for you to live in as a home? A. Yes."

The trial court seems to have given conflicting instructions on this matter of agency, one apparently making it a matter of law, another as a matter of fact for the determination of the jury. This itself was reversible error.

We are referred to the decision of our court in *Fischer & Co. v. Anslyn*, 30 Mo. App. 316, by counsel for appellant in support of their claim that, as a matter of law, the trial court should have declared that the husband was acting in this matter as agent for his wife and with her authority, although not expressly given, that authority established by implication arising on the facts in the case. Our court there said (l. c. 320) that if the wife had been before the

trial court, where the case was on appeal from a judgment of the justice of the peace, the court, "upon the evidence, would have been warranted in finding that she was bound by her husband's contract in building the house, for the record plainly shows that the wife contemplated building, having mortgaged her property to raise money for that express purpose, and covenanted with the mortgagee that she would keep the premises free from all mechanic's liens. Can it be said that after she had permitted her husband to go on and make the contract for these contemplated improvements, and superintend the erection thereof, and expend her money thus raised as she intended it should be expended, and have moved in and occupied the house, that the policy of the law will permit her to claim, that not only her interest in the land, but that the house also, is not subject to a mechanic's lien for materials that entered into the construction of the building? And all because she was not an express party to the contract, and no express agency was shown in the husband? We do not think that she can shield herself behind such a defense. '*Qui facit per alium, facit per se,*' is a maxim entirely applicable here."

While on the facts before the court in that case this is *obiter*, we hold it applicable here. On the facts here in evidence and which we have summarized, it is clear, as a matter of law, that the wife is estopped from denying the agency of her husband in the erection of the house and that she thereby bound her property for the value of this material which went into the construction of the house. So we held when this case was first argued and submitted.

The remaining proposition turns on the question of estoppel, raised by defendants, respondents here, and on which proposition we granted the rehearing, we having held that, on the facts in evidence, the question of estoppel was for the jury.

The estoppel pleaded is failure of plaintiff to advise Mr. Eicks, the defendant who had contracted with Wahlbrink, that Wahlbrink owed it for material that went into the construction of the house; that the plaintiff, by its silence as to its claim, had misled defendants and thus occasioned them to pay the contractor in full for the work when otherwise they might have retained a sufficient amount of the fund to liquidate plaintiff's claim.

The evidence bearing on this is, that about the time of the completion of the building, Mr. Eicks wrote plaintiff this letter, dated September 29, 1909:

"I understand you have furnished material to Mr. Wahlbrink, contractor of my house on Alice avenue. The house is nearly completed and to avoid any possibility of mechanic's liens being filed, I would be pleased to have you inform me if your bills for material are not paid, so I can govern myself accordingly when I settle with Mr. Wahlbrink."

It may be here stated that on January 4, 1910, and within four months after the demand accrued, plaintiff had filed its lien account, first giving the owner notice, all as required by statute, and in due time thereafter began this action.

Mr. Eicks testified that he dropped the letter, of which the above is a copy, in the post office, duly addressed and stamped and had waited nearly thirty days without having received any information, one way or the other, from the plaintiff Boeckeler Lumber Company on the matter; that he then called up the Boeckeler Lumber Company, plaintiff here, hereafter referred to as the lumber company, on the telephone. He said he would not fix the exact time of that telephone call, but it was before he had paid Mr. Wahlbrink in full; ten days before that. When he called up the lumber company he asked for the manager of the office and a Mr. Meyer answered the telephone and giving his name said he was the bookkeeper. Mr. Eicks tes-

Boeckeler Lumber Co. v. Wahlbrink.

tified that he told Mr. Meyer who he (Eicks) was; that he was building a house on Alice avenue and wanted to know from him whether or not there was any money due the Boeckeler Lumber Company on that job; that sometime before then he had sent it (the lumber company) a letter and asked him (Meyer) if he knew anything about it. Meyer said he believed there was such a letter there but he "didn't know exactly;" that "to wait a minute" and he would call Mr. Boeckeler to the telephone. Whereupon Mr. Boeckeler, the secretary of the lumber company, came to the telephone and Mr. Eicks told him that he had mailed a letter to them and wanted to know whether there was any money due the Boeckeler Lumber Company by Wahlbrink on account of lumber the Boeckeler Lumber Company had delivered to Wahlbrink on account of his (Eicks') house on Alice avenue. He testified that Mr. Boeckeler answered that Wahlbrink owed it (the lumber company) some money, he thought, but he didn't know if it was on the Eicks' job or not; that he would look it up and let Mr. Eicks know. That, said Mr. Eicks, was all there was of it and the end of it; that Boeckeler said that he would look it up and let him (Eicks) know. Mr. Eicks further testified that he told Mr. Boeckeler in this conversation over the telephone that he was going to make his final settlement with Wahlbrink "by a certain date," but that he would keep out whatever bills were coming to the Boeckeler Lumber Company, if any, if that company had furnished Wahlbrink any material that was not paid for, and deduct it from Wahlbrink's accounts. At that time there was something over \$1319.50 due Wahlbrink from Eicks on this house. Mr. Eicks further testified that he had not heard anything from the lumber company when Wahlbrink came to him at his office for the payment of this money; that he then asked Wahlbrink if everything was paid; that he further told Wahlbrink that he had notified the Boeckeler Lumber Company

and that they paid no attention and gave him no response. He thereupon asked Wahlbrink if everything had been paid and Wahlbrink said it had. Whereupon he paid Wahlbrink the balance the latter claimed to be due.

On cross-examination Mr. Eicks testified that he had waited ten days after his telephone conversation with the Boeckeler people before he had paid Wahlbrink off. Whether that was within or after the "certain time" he had told Boeckeler, does not appear. Asked if Mr. Boeckeler had not, as he (Boeckeler) testified, told him (Eicks) distinctly that Wahlbrink owed him money, Mr. Eicks testified that Mr. Boeckeler, in his conversation over the telephone, had told him that Wahlbrink owed them some money, but that he (Boeckeler) did not know whether it was on the Eicks' job or not; that he did not know, but that he would let him know. He testified that he had not been shown any receipt by Wahlbrink evidencing that he (Wahlbrink) had paid the Boeckeler Lumber Company in full, nor was he shown other evidence of that fact, such as a cancelled check; did not ask for these, he testified, because he had written the lumber company and telephoned it and it had not informed him of any claim. What he meant by writing, he said, was the letter above transcribed, and the telephone conversation was the one which we have given.

While we rest the determination of this question of estoppel on the testimony of Mr. Eicks, it is not out of place to say that Mr. Boeckeler, testifying, said that this conversation over the telephone occurred about the middle of October, 1909; that in that conversation Mr. Eicks had not referred to having written him any letter; that he (Boeckeler) knew nothing of the letter; that in the conversation with Eicks he had told him that the Wahlbrink account was not paid. In short, Mr. Boeckeler, while admitting the conversation,

gave a rather different version of it from that given by Mr. Eicks.

Resting our conclusion on the version of the conversation and of the acts as given by Mr. Eicks, we think the learned trial court should have declared, as a matter of law, that there was no estoppel by silence against the plaintiff and should not have submitted that as a question of fact to the jury.

In *Palmer v. Welch*, 171 Mo. App. 580, 154 S. W. 433, our court had occasion to consider the question of estoppel by silence and in a very careful opinion announces the rule as to estoppel *in pais*. There, at page 596, and following, we find this, which we here repeat as very apposite:

“It is said that to constitute an estoppel *in pais* there must have been (1) a false representation or a concealment of material facts, (2) made with the knowledge of such facts, (3) to one who was ignorant of the truth of the matter, (4) with the intention that he should act upon it, and (5) that he was induced to do so.” Citing many authorities our court then said: “However an estoppel may arise from mere silence, or passive conduct on the part of one who has knowledge of the facts and whose duty it is to speak, where such silence or conduct is misleading.” After quoting from *Bigelow on Estoppel*, *Guffey v. O’Reiley*, 88 Mo. 418, is cited and the summary of the rule as given by Lord Denman in *Gregg v. Wells*, 10 Ad. & E. 98, is quoted to the effect that “a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.” Other authority is given (l. c. 598) as holding: “In equity, therefore, where a man has been silent, when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.”

Applying these rules to the facts here in evidence, we do not think that those facts establish an estoppel as against the plaintiff, appellant here. There was no "silence" here, applying to that term the test as above given. The most that can be said in favor of the appellants is that the Boeckeler Lumber Company broke their promise to Mr. Eicks, that they would look up the state of their account between themselves and the contractor and let Mr. Eicks know. Most certainly this was no assurance that Wahlbrink, the contractor, was not the debtor of the lumber company. On the contrary, it was a distinct statement of the fact that Wahlbrink did owe them, whether on the account for material that went into this house, they did not at the time know. We find no word indicating when this information was to be given. Mr. Eicks, with this clear warning, chose to go ahead, without further inquiry of the lumber company, and settle with Wahlbrink. There is no misleading statement here—no suppression of fact. The Boeckeler Lumber Company had four months within which to file their lien, giving notice ten days before that to the owner, and Mr. Eicks is chargeable with notice of this. That he did not altogether rely on this promise, appears by his own testimony. He told Wahlbrink that he had notified the lumber company and that it had paid no attention to him and had given him no response. Thereupon he paid him, making no further inquiry of the lumber company. Eicks certainly was not told by the lumber company that Wahlbrink owed them nothing. That company told him just the contrary, but that it did not know whether part of that indebtedness was on this job or on others. There is no word, no intimation from Eicks to the lumber company that immediate payment was to be made to Wahlbrink. Eicks testifies he told Boeckeler he was to pay Wahlbrink "by a certain day." What day? How then can it be said that Eicks was compelled to settle with Wahlbrink without following

up the matter with the lumber company. Without making further inquiry, and we think that the duty to make further inquiry was on him, without any further advices from the lumber company, Mr. Eicks saw fit to settle in full with the contractor, on the contractor's assurance that he had paid the lumber company in full. When Mr. Eicks chose to act on the word of the contractor as he did, he cannot fall back on the lumber company. When he settled, he did so at his peril, and was not justified in acting in consequence of any misleading silence by the lumber company.

We hold that, as a matter of law, there was no estoppel by silence and the jury should have been so instructed.

So holding and having held that the fact of the agency of the husband for his wife should have been held as a matter of law, the court should have given, as requested by defendants, an instruction to the jury to find the issues for plaintiff against the defendant Wahlbrink for the debt, and establish the amount of that as a lien against the property.

The judgment of the circuit court should be reversed and the cause remanded with directions to the circuit court, the amount of the debt and interest thereon to the date of the verdict having been found by the jury, to enter up judgment for that and accruing interest thereon and costs against the defendant Wahlbrink, and to adjudge the amount so found as a lien against the interests of the remaining defendants in the property described. *Allen, J.*, concurs in a separate opinion filed. *Nortoni, J.*, concurs in separate opinion filed, in so much of the opinion as holds the husband was the agent of his wife in the transaction but dissents to the second ground for reversal, holding that the question of estoppel by silence was one of fact for the jury, and considering that the opinion on that is in conflict with the decision of the Kansas City

Court of Appeals in *Chilton v. Lindsay*, 38 Mo. App. 57, asks that this case be certified to the Supreme Court, which is accordingly done.

CONCURRING OPINION.

ALLEN, J.—In concurring in the views expressed by my Brother REYNOLDS herein, I merely wish to add, on the question of “estoppel by silence,” that this is not a case where a lienor has stood by in silence seeing the contractor paid in full, under circumstances where such silence would lead the owner to believe that the lienor had no claim, and this was relied upon by the owner to his prejudice. Undoubtedly an estoppel would then arise, as in any other such transaction. It would be the lienor’s duty to speak, under such circumstances, and his silence would be tantamount to an assurance to the owner that he had no claim. And not having spoken, when in good conscience he should, he ought not to be heard thereafter to assert a claim against the owner. Here the plaintiff did not know that the owner was, in fact, paying the contractor in full, in the belief that the latter had paid all material bills. How can it be said, then, that an estoppel will arise against plaintiff? It seems quite clear that there was no legal duty resting upon plaintiff to speak further than it did, taking defendant’s evidence therefor, and that it was guilty of nothing more than a breach of an unactionable promise to investigate the matter and notify the owner. Assuming that plaintiff neglected and failed to keep its promise, it does not follow that there was any reason to suppose that such neglect and failure would lead the owner to settle in full with the contractor without hearing from plaintiff, particularly when the owner had been informed that the contractor owed plaintiff for material for which the latter might or might not have a lien claim. And it seems equally clear that the owner, having such

information, was not entitled to rely upon the mere failure to hear further from plaintiff, as an assurance that the latter had no claim against the property.

DISSENTING OPINION.

NORTONI, J.—I concur in the first proposition treated with in the opinion, to the effect that Mrs. Eicks is estopped by joining her husband in executing the mortgage on her lot to raise money with which to erect the house thereon. But I dissent from the second proposition, touching the matter of estoppel by silence. In my judgment, this was a question for the jury.

Eicks, or his wife, rather, owned the lot, and Wahlbrink, the contractor who erected the building thereon, purchased the materials from the plaintiff lumber company. The privity existing between these parties—that is, the lumber company, who furnished the material, and Eicks, who owned the lot—is clear, for, indeed, the proceedings to enforce a lien go upon that theory. Such privity existing between Eicks, through the contractor, with the lumber company, rendered it the duty of the lumber company to speak concerning the indebtedness of Wahlbrink to it when Eicks inquired concerning that subject-matter. Manifestly, if one holds a right to enforce a lien upon the building and lot of another as incident to an account contracted by a third party in privity with both, it is proper that such person whose property may be subjected to the lien should be informed by the creditor concerning the state of the account, on inquiry thereabout. In this view, I deem it to have been the duty of the lumber company to speak on the subject when Eicks, the owner of the house, inquired as to whether Wahlbrink, the contractor, owed such company. However, it appears the lumber company did speak, that is, to the effect that it knew Wahlbrink owed it something, but on just what account it could not state at that time, and it is said

the company promised to furnish the desired information and omitted to do so. In my judgment, these facts are competent for consideration by the jury on the question of estoppel by silence in order to ascertain whether Eicks was misled, for, though the company spoke in response to inquiry, it did not speak to the point, as it should, by furnishing the information Eicks was entitled to have.

I deem the judgment of the court to be in conflict with the just principles declared by the Kansas City Court of Appeals in the case of Chilton v. Lindsay, 38 Mo. App. 57, wherein a similar matter of estoppel was asserted, and therefore request the case be certified to the Supreme Court for final determination in accordance with the mandate of the Constitution in that behalf provided.

LILLIAN A. MATHIAS, Appellant, v. JAMES H. ARNOLD et al., Respondents.

St. Louis Court of Appeals, May 4 and July 15, 1915.

1. **MARRIED WOMEN: Equity: Jurisdiction: Effect of Enactment of Married Women's Act.** The power of courts of equity to protect the separate estate of the wife against the marital rights of her husband and the claims of his creditors was not restricted by the enactment of the Married Women's Acts, the design of which is to enlarge, and not restrain, the remedies of *femmes covert*.
2. ———: **Injunctions: Right to Restrain Sale of Wife's Property for Husband's Debt.** Under Sec. 2534, R. S. 1909, in view of Secs. 8308 and 8309, as well as under the general jurisdiction possessed by courts of equity to protect the separate estate of a married woman from the claims of her husband or his creditors, an injunction will lie to restrain the sale of a wife's real property under an execution issued upon a judgment against her husband.
3. ———: ———: ———: **Pleading: Damages.** A petition for an injunction to restrain the sale of a wife's real property

Mathias v. Arnold.

under an execution issued upon a judgment against her husband need not plead the injurious consequences resulting from the execution and sale of the wife's property with particularity, since prejudice will be presumed from the doing of prohibited acts.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones*, Judge.

REVERSED AND REMANDED (*with directions*).

P. P. Mason and *John Cashman* for appellant.

(1) Under the provisions of section 2534, Revised Statutes 1909, a separate ground of relief is due appellant on each charge made in her petition. (2) The threatened sale in this case need not constitute a cloud on the title; it is enough if the appellant is interfered with in any way in the absolutely free use and disposition of her property. *Duncan v. Turner*, 171 Mo. App. 677; *The Charter Oak Life Ins. Co. v. Cummings*, 90 Mo. 271. Under the amendment of the statute, an additional remedy was created for such cases as the present one. *Neeley v. Bank*, 114 Mo. App. 467. (3) The petition contains averments which show that in a contest between appellant and a purchaser at the execution sale, appellant would be required to introduce oral testimony and the petition alleges that she would be required to do so, and the demurrer admits that she would be required to do so; under this state of facts, the appellant is entitled to the relief sought. *Payne v. Davis Co. Svgs. Assn.*, 126 Mo. App. 593; *Carel v. Meek*, 155 Mo. App. 337. (4) The appellant was entitled to the relief sought to prevent a cloud being cast upon the title of her property. *Bonsor v. Madison County*, 204 Mo. 99; *Gardner v. Terry*, 99 Mo. 523. Injunction will even lie in favor of a wife against a judgment creditor of her husband to prevent the sale

of the wife's personal property under an execution against her husband, although at common law the husband, by marriage, acquires an absolute right to all the personal property in possession, belonging to the wife. And this rule was announced by our Supreme Court prior to the enactment of the Married Woman's Acts. *Holhaus v. Hornbostle*, 60 Mo. 439; *Insurance Co. v. Cummings*, 90 Mo. 271.

Otto F. Karbe and *H. C. Whitehill* for respondents.

(1) It is true, as appellant contends, that under the provisions of section 2534, Revised Statutes of Missouri, 1909, equitable relief may be granted where a cloud would be put upon title to real estate by sale under an execution against a person, partnership or corporation having no interest in such real estate subject to execution at the time of sale. The statute, however, does not define what constitutes a cloud upon title, nor does it say that every such sale of real estate under execution shall constitute such cloud; therefore, the statute in itself does not afford appellant any particular relief, except such as the general principles of law and equity may allow. (2) The right of the plaintiff to maintain her suit is based upon equity grounds alone, and unless the petition states facts which show she is affirmatively entitled to equitable relief, the demurrer of the defendant should be sustained. Considering the petition from its several allegations and as a whole, it will be seen that the ground of the action is apprehension by the plaintiff that a sale of the property would cast a cloud upon the title to her real estate. (3) In construing a demurrer, it is true that, in effect, it admits all material allegations of the petition, but it is likewise true that a demurrer does not admit immaterial matter nor conclusions of law. *State ex rel. v. Barnett*, 245 Mo. 99; *Donovan v. Boeck*, 217 Mo. 70;

Mo. Lincoln T. Co. v. Third Natl. Bank, 154 Mo. App. 89; Lackawanna C. & I. Co. v. Long, 231 Mo. 605, 614. Nor does a demurrer admit conclusions of the pleader on the facts constitutive of the cause of action, nor the correctness of averments concerning the meanings of the allegations pleaded in the bill. Donovan v. Boeck, 217 Mo. 70; State ex rel. v. Denton, 229 Mo. 187. Nor does a demurrer admit argumentative matter pleaded in a petition. Stonemetz v. Head, 248 Mo. 254.

(4) Considering the allegations of the amended bill itself, we find that the ground of complaint is the alleged threatened cloud that would be placed upon plaintiff's title; but a cloud upon a title can only be created in accordance with certain well-recognized legal doctrines, i. e., the facts must be such as equity itself would pronounce them to constitute a cloud upon the title and force the owner to resort to extrinsic evidence to maintain his title as against the cloud. Where an instrument is of such character as to require "legal acumen" in order to determine whether it is a cloud upon the title, it is only then that a court of equity will interfere. 32 Cyc. 1312, 1315; 7 Cyc. 256; Taylor v. Swearingen, 161 Mo. App. 467; Carrel v. Meek, 155 Mo. App. 337; 6 Am. & Eng. Enc. Law (2 Ed.), p. 153.

(5) As to whether equity will interfere in a given case, must first affirmatively appear from the petition that there is no adequate remedy at law, and in an action such as this, if plaintiff has an adequate legal remedy, she cannot maintain this suit. This is an elementary equitable principle and requires no citation of authority. (a) In actions such as this the common-law remedy of ejectment is generally regarded as plain, adequate and complete, and a party will ordinarily be left to that remedy where it exists. 32 Cyc., p. 1312; Odle v. Odle, 73 Mo. 289; Railroad v. Nortoni, 154 Mo. 159. (b) To constitute a cloud upon the title, the deed or proceedings must be capable of embarrassing the title or coming within the chain of title; and where the invalidity

of the instrument or matter complained of appears upon the face of the instrument or claim, equity will not interfere. 7 Cyc. 256; 6 Am. & Eng. Enc. Law (2 Ed.), p. 153; 32 Cyc., pp. 1315-16, and cases cited; Clark v. Ins. Co., 52 Mo. 272; Dunklin County v. Clark, 51 Mo. 60-62. (c) A bill in equity will lie to remove as a cloud on title a sale of land under execution where the invalidity of the sale can be shown only by extrinsic proof, but equity will not interfere to prevent or remove such sale as a cloud upon title when complainant's title is not affected thereby, and there is no necessity of resorting to extrinsic proof to show the deed's invalidity. 32 Cyc., p. 1322; 6 Am. & Eng. Enc. of Law (2 Ed.), p. 153; Merchants' Bank v. Evans, 51 Mo. 335; Clark v. Cooper, 148 Mo. App. 230.

ALLEN, J.—This is a suit in equity seeking to restrain the threatened sale of real property belonging to plaintiff, a married woman, under an execution issued upon a judgment against her husband, and to release plaintiff's property from the levy of such execution. The defendants are the judgment creditor of the husband, for the attempted collection of whose judgment debt the execution was issued and levied, and the sheriff of the city of St. Louis who made the levy and who was proceeding to sell the property in question. The court below sustained a demurrer interposed by defendants to plaintiff's amended petition. Plaintiff declined to plead further, and final judgment having been entered upon the demurrer, plaintiff appealed. The court put into effect a temporary restraining order, holding the matter *in statu quo* pending the appeal.

The amended petition avers that plaintiff is the owner and in possession of certain tracts of land in the city of St. Louis, describing them, improved by four separate residence buildings; that on May 10, 1910, the defendant Arnold obtained a judgment in the

circuit court of the city of St. Louis against one Colonel A. Mathias, in the sum of \$1000 and interest, which judgment remains unpaid and unsatisfied; that on the — day of November, 1912, defendant Arnold caused to be issued out of the office of the clerk of the circuit court of the said city of St. Louis, an execution upon said judgment directed to the defendant Louis Nolte, then the sheriff of said city, and directed and caused the latter to levy upon and seize, as the real estate and property of Col. A. Mathias, the real estate described, which, at the direction of defendant Arnold, was duly advertised for sale under such execution, and that the defendant sheriff was, at the time of the institution of this suit, proceeding to consummate such sale.

It is averred that the execution debtor, Col. A. Mathias, is the husband of this plaintiff; "that he never had, nor has he now," any interest in said real estate of plaintiff, subject to execution, and has only such interest therein "as he derives from being the husband of this plaintiff."

The petition then alleges that, if the threatened sale of plaintiff's real estate be so made, a cloud will be put on plaintiff's title thereto; "that because of the relationship of plaintiff as the wife of said Col. A. Mathias, and because he has assisted as her agent in the buying and selling of real estate in the said city of St. Louis, a widespread suspicion exists amongst the real estate dealer and others in the said city" that plaintiff's husband owns some interest in such real estate, and if said sale were consummated, plaintiff, before she could lease, mortgage or dispose of such real estate, would be compelled to institute a suit or suits to clear the title to the various parcels thereof.

It is further alleged that there are persons, associations and corporations organized in the city of St. Louis who practically control all of the real estate transactions therein; and that they have promulgated

and established rules which will deprive plaintiff of the power to mortgage or dispose of her real estate, if sold under said execution, and that such sale would, on this account, destroy the selling, trading and loan value of said real estate; that abstracts of title are not used in the city of St. Louis, but that all questions of title are shown by certificates of title issued by the only persons and companies engaged in the abstracting business in said city, and that none of said abstractors will issue a clear certificate of title to property belonging to a wife where a sheriff's deed appears of record pursuant to a sale under an execution against her husband, by reason whereof it is impossible to borrow money upon or dispose of such property. And it is averred that because of the levy of said execution plaintiff has been and will be unable to renew an existing loan secured by mortgage upon some of the property, which fell due after the levy, and that plaintiff is threatened with the loss of such property by foreclosure.

It is further alleged that the declared purpose and intent of defendant Arnold is to harass and annoy plaintiff by so levying upon her property, with the hope that thereby she may be forced into paying said judgment against her husband; that defendant Arnold is wholly insolvent, and that plaintiff is without adequate remedy at law in the premises.

Such, in substance, are the allegations of the petition, which is quite lengthy and for that reason is not fully set out.

The demurrer was evidently sustained upon the theory that no such cloud would be cast upon the title to plaintiff's property by the threatened sale thereof, and the execution and recording of a sheriff's deed pursuant thereto, as to call for equitable interposition. And in support of the ruling below respondents invoke the doctrine that equity will not, as a rule, interfere to restrain the sale of land where the plaintiff is in

possession and holds a legal record title which, unaided by extrinsic evidence, is superior to any title that can be acquired by a purchaser at the sale in question, and has a complete and adequate remedy at law against any claim that may be asserted by such purchaser (see *Russell v. Lumber Co.*, 112 Mo. 41, 20 S. W. 26; *Wilcox v. Walker*, 94 Mo. 89, 7 S. W. 115; *Kuhn v. McNeil*, 47 Mo. 389; *Herman v. Westheimer*, 110 Mo. App. 191, 85 S. W. 101); that in order that a cloud may be cast upon the title of a record owner in possession, so as to call for equitable relief, the title, lien or claim which is asserted to cast a cloud upon the owner's title must be one apparently valid upon the face of the record, requiring resort to extrinsic evidence to establish its invalidity (see *Turner v. Hunter*, 225 Mo. 71, 123 S. W. 1097; *Hannibal & St. J. R. Co. v. Nortoni*, 154 Mo. 142, 55 S. W. 220; *Clark v. Insurance Co.*, 52 Mo. 273; *Dunklin County v. Clark*, 51 Mo. 60).

Prior to the amendment, in 1899, of what is now section 2534, Revised Statutes 1909, it was held that one holding the record title to real property and in possession thereof could not maintain a bill in equity to restrain the sale of such land under an execution against a stranger to the title who had no real or apparent interest therein and hence nothing would pass by such sale. [See *Kuhn v. McNeil*, *supra*; *Drake v. Jones*, 27 Mo. 428.]

This statute as it now stands is as follows:

“The remedy by writ of injunction or prohibition shall exist in all cases *where a cloud would be put on the title of real estate being sold under an execution against a person, partnership or corporation having no interest in such real estate subject to execution at the time of the sale, or an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever whenever in the op-*

inion of the court an adequate remedy cannot be afforded by an action for damages."

The words in italics were added by the amendment of 1899.

This statute is invoked by appellant as here authorizing the granting of the injunctive relief sought, evidently upon the theory that the amendment was intended to afford a remedy, not theretofore existing, where the execution debtor has no interest, real or apparent, in land levied upon. Such, however, is not the view taken by the Kansas City Court of Appeals, which has held that under the statute, as amended, the owner of the legal record title, in possession, cannot maintain a suit in equity to restrain a sale thereof under an execution against a stranger to the title, who has neither a real nor an apparent interest therein; that the statute authorizes injunctive relief only where a cloud would be put upon the owner's title by such sale, and that a cloud can be so cast upon the title only when the execution debtor has some apparent interest in the land, which will make it necessary for the owner to offer evidence extrinsic to the record to support his title and defeat a recovery by the purchase at the execution sale. [See *Payne v. Savings Assn.*, 126 Mo. App. 1. c. 598, 105 S. W. 15; *Carrell v. Meek*, 155 Mo. App. 337, 137 S. W. 19; *Taylor v. Swearingen et al.*, 161 Mo. App. 467, 144 S. W. 160.] But, in the case before us, we do not deem it necessary to express any opinion as to the effect of the amendment in question. In our judgment the right asserted by this plaintiff to restrain the levy of execution upon her property, and its sale thereunder, in attempted satisfaction of the judgment debt of her husband, may be upheld for reasons which do not enter into a case of this general character where the owner and the execution debtor are strangers.

In *Payne v. Savings Assn.*, *supra*, the execution debtor and the owner were not husband and wife, and

it appeared that plaintiff would have been compelled to defend his title by evidence extrinsic to the record, and was held to be entitled to restrain the sale under the execution.

In *Carrell v. Meek*, *supra*, the execution debtor and the owner were husband and wife. The legal title to the property had at one time been in the husband, and for this reason it was held that the plaintiff was entitled to injunctive relief to prevent the casting of a cloud upon her title, under the statute, *supra*, citing *Neeley v. Bank*, 114 Mo. App. 467, 89 S. W. 907; *Payne v. Savings Assn.*, *supra*; 6 Am. & Eng. Ency. Law (2 Ed.), p. 163.

In *Taylor v. Swearingen*, *supra*, which is here greatly relied upon by respondents, it is said that the execution debtor and the plaintiff were in fact husband and wife, but the learned author of the opinion states, at the outset, that the record nowhere showed this. The case was therefore disposed of as though such parties were strangers; and the plaintiff was denied the relief sought, upon the theory that no such cloud would be put upon her title as to call for equitable intervention.

In the instant case we think that plaintiff's right to injunctive relief is clear, regardless of the precise nature of the blot which may be put upon her title if defendants be not restrained as prayed; this because of the relation of husband and wife existing as aforesaid and the power and duty of a court of equity to protect the wife's separate property from process to enforce the payment of claims of the husband's creditors. It was an early doctrine of equity that the estate which a *femme covert* was capable of taking to her own separate and exclusive use would be protected against the marital rights and claims of the husband and of his creditors as well. [See *Holthaus et al. v. Hornbostle*, 60 Mo. l. c. 442; 2 Story Eq., 1380.] And in *Pawley et al. v. Vogel*, 42 Mo. l. c. 303, it was said:

"If the trust could be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would have been a proceeding in equity on her behalf to establish the settlement, and to obtain a perpetual injunction to restrain a sale of the property under a judgment at law against him." [See, also, *Neeley v. Bank*, supra, l. c. 470, 471.]

It would appear that the power of our courts of equity, theretofore possessed, to protect the separate estate of the wife against the marital rights of the husband and the claims of his creditors, is not restricted by the enactment of the Married Women's Acts, the design thereof being to enlarge and not to restrain the remedies of *femmes covert*.

It is said that "an essential attribute of the wife's separate estate is that it is not liable for her husband's debts, and she is entitled in equity to relief by injunction against the levy of execution thereon by his creditors." [See 21 Cyc., p. 1439.]

Our statute (section 8309, Revised Statutes 1909) provides: "All real estate and any personal property, including rights of action belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor or as grow out of any violation of her personal rights shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband." (Italics ours.)

A proviso to this section makes the wife's separate personalty liable for a debt of the husband created for necessities for the wife or family, but provides that in any such case before execution may be levied upon the wife's separate property she must have been made a party to the action "and all questions involved shall

have been therein determined and shall be recited in the judgment and the execution thereon."

Section 8308, Revised Statutes 1909, provides: "That the rents, issues and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate which belonged to her before marriage or which she may have acquired by gift, grant, devise or inheritance during coverture, *shall during coverture, be exempt from attachment or levy of execution for the sole debts of her husband.*" (Italics ours.)

It thus appears that our statutory law expressly exempts the wife's separate property from levy of execution for the sole debts of the husband, and forbids its seizure under any process of law for the husband's debts. It seems clear to us, therefore, that where a wrongful levy, in violation of such express statutory provisions, is made upon a wife's separate property, the power of a court of equity to interfere is beyond question. Section 2534, *supra*, among other things authorizes injunctive relief to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages. Thus the statute, aside from the inherent power of a court of equity to prevent the perpetration of legal wrongs for which the law affords no adequate remedy, is broad enough to authorize the granting of the relief here sought. Sections 8308 and 8309, *supra*, clearly, we think, prohibit the doing of the very thing here sought to be restrained, and from the allegations of plaintiff's bill it fully appears that she is without remedy at law in the premises. Consequently it was within the power of the court below, and was its duty, in our judgment, to entertain plaintiff's bill praying for relief.

This question is fully discussed in a well-reasoned opinion in Hunter's Appeal, 40 Pa. St. 194. The action

was by bill in equity to restrain the sale of certain real estate of the complainant on execution against her husband, it being averred, as here, that the exclusive ownership of the property was in the wife. The court said:

"Thus the exclusive ownership and title of the wife, the complainant, stood admitted, and the bill must have been dismissed for want of jurisdiction or the inapplicability of the remedy.

"The question now is, did the chancery power of the court extend far enough to afford the relief prayed? Nothing but want of jurisdiction in the court or irrelevancy of the proposed remedy, could have authorized the summary dismissal of the bill. Did they exist? On the pleadings the only question presented was whether, since the Acts of April 11, 1848, and April 12, 1850, a levy and sale of a wife's property on execution against her husband, was or was not contrary to law? If it was, and there was no adequate remedy at law for the act, then the court had jurisdiction of the subject-matter of the complaint; and it not being denied that it also had of the parties, the relief prayed for ought to have been granted."

The opinion then concedes that it had been the constant practice in the Commonwealth of Pennsylvania to permit a judgment creditor to levy execution upon any property in which he may believe his debtor to have an interest; that in such cases the question of title was usually left to the test of an ejectment; and, as a rule, courts of equity were powerless to interfere, despite the hardship often entailed upon owners of real property.

The Act of 1848, referred to, provided that the property of a married woman should continue to be her separate property after marriage as fully as before, and should "not be subject to levy and execution for the debts and liabilities" of the husband. And the Act of 1850 provided that "the real estate of any mar-

ried woman in this Commonwealth, *shall not be subject* to execution for any debt against her husband, on account of any interest he may have, or may have had therein as tenant by the curtesy, *but the same shall be exempt from levy and sale* for such debt during the life of the wife." (Words in italics appear thus in the opinion.) Referring to the latter act, and the equitable jurisdiction of the courts of that State, the opinion thus proceeds:

"This act plainly forbids execution, because it expressly *exempts* the property from *levy and sale*. The question then recurs, are a levy and proceedings to sell a wife's property for the debt of the husband in the lifetime of the wife, under the exemption and prohibition of the acts cited, contrary to law or not? It is not easy to demonstrate the truth of a proposition that is self-evident, and it would be little less troublesome to prove what is so palpable on the face of these statutes. The whole object of the latter one is to deny legality to a levy and sale of the property therein described. Whatever, therefore, cannot be done without a violation of law, must be contrary to law, and being so, may be restrained if there be no adequate remedy at law.

"The fifth clause of the third section of the Act of June 16, 1836, now in force throughout the Commonwealth, gives the several courts jurisdiction in equity 'for the prevention or restraint of the commission or continuance of acts *contrary to law*, and prejudicial to the interests of the community or the rights of individuals.' Acts which may be restrained, must be *both* contrary to law *and* prejudicial to the interests of the community or the rights of individuals.

"We have already shown the act of a levy on a married woman's property, with proceedings necessary to consummate a sale, to be contrary to law. Is not the prohibition itself sufficient evidence that the act, in the estimation of the Legislature, would be prejudicial

to the right protected by the prohibition? This cannot be doubted. It would be folly to prohibit harmless acts. It is, therefore, always to be presumed, that whatever is prohibited, is either wrong in itself or against the policy of the government. The foundation for the prohibition in both cases, is the prejudicial consequences of the acts prohibited. It is not, therefore, necessary, when there is a statutory prohibition of an act, to trace out prejudicial consequences to bring it within the defined jurisdiction in equity of our courts. If the law be transcended or disobeyed, the act may be restrained.

"In the case before us, the property was confessedly the wife's exclusively. It was exempt from levy and sale for the debts of the husband by statute. Subjecting it to such process for such purposes was also prohibited by the same statute; notwithstanding this, the appellees did levy on it, and were proceeding to sell it when the injunction was applied for. This law and these facts clearly brought the case within the chancery jurisdiction of the court below, and instead of dismissing the bill, the court should have granted a preliminary injunction to restrain the appellees from proceeding to levy and sell the property."

Our statutes in question certainly are as explicit and far reaching as those discussed in the above opinion. Section 8308, *supra*, expressly exempts the interest of the husband in the wife's right, in her separate real estate, from attachment or levy of execution for the sole debts of her husband. And section 8309, *supra*, in terms forbids the taking of the wife's separate property, real or personal, by any process of law whatsoever for the debts of the husband, with the exception above noted. To permit the wife's property to be levied upon, as here, is clearly in contravention of law, and constitutes the doing of a legal wrong for which it appears no adequate remedy at law is afforded the plaintiff. The reasoning of the case from which we

have quoted at length appears to be altogether sound; and the doctrine that equity will interfere in cases of this character is not without other authority to support it. [See *Miller, etc. v. Johnson et al.*, 27 Md. 6; *Bridges and Woods v. McKenna*, 14 Md. 258; *Love v. Graham et al.*, 25 Ala. 187; *Walker's Appeal*, 112 Pa. St. 579.]

We perceive no sound reason why our courts of equity should not, in the present state of our law, afford relief to a married woman to protect her property against the claims of her husband's creditors. As said in *Hunter's Appeal*, *supra*, we think it unnecessary to look to see whether prejudicial consequences will result from the doing of the acts sought to be restrained, since they are prohibited by law and presumptively harmful. Plaintiff's petition alleges many things tending to show that loss and damage to her will ensue unless defendants are restrained as the petition prays. Respondents assert that the amended petition contains much immaterial matter, and abounds in conclusions and arguments of the pleader and recitals of evidence relied upon. It is unnecessary for us to consider in detail the allegations of the amended petition. It fully suffices, in our opinion, to state a cause of action for the relief sought. Undoubtedly where the wife's property is levied upon for the husband's judgment debt results follow, owing to the relationship of the parties, which would not ensue were they strangers. In the particular case the prejudicial effects of the levy and threatened sale appear from allegations of the petition which are more than mere conclusions or surmises of the pleader. But we regard it unnecessary to plead the injurious consequences with particularity. Surely one ought not to be permitted to harass and embarrass a wife by a levy upon her sole and separate real property, and a threatened sale thereof, for a debt of her husband, in the face of the statutory prohibition aforesaid, designed to protect the

property rights of married women, upon the theory that the wife is not thereby injured. Certainly doubt would be cast upon her title to the land, as her sole and separate property, by a sale under such execution; for a sheriff's deed filed of record would carry with it the imputation that the husband had in fact been the real owner, the wife's title being merely colorable, as is frequently the case. And the wife, though the true owner, as of her sole and separate property, would be compelled to endure the consequences until such time as the purchaser saw fit to take further steps, unless in some manner granted relief. We think that it would be lame and halting equity indeed that could not reach such a situation with a remedy. [*Pocoke v. Peterson*, 256 Mo. l. c. 519, 165 S. W. 1017.]

The law affords ample means for reaching property fraudulently conveyed to the wife. No such question is here involved, for the demurrer admits the separate and exclusive ownership of the plaintiff.

We therefore hold that it was error to sustain the demurrer to the amended petition. The judgment of the circuit court will accordingly be reversed, and the cause remanded, with directions to reinstate the demurrer, overrule it, and that such further proceedings be had in the case as are consistent with the views expressed above. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

ON MOTION FOR REHEARING.

ALLEN, J.—Respondents, in their motion for a rehearing, insist that the foregoing opinion is in conflict with that of the Kansas City Court of Appeals in *Taylor v. Swearingen*, *supra*. It is said that the opinion in that case shows merely that it did not appear "in any of the proceedings in the case wherein the execution was issued" that the judgment debtor and the plaintiff therein were husband and wife. It is true

Mathias v. Arnold.

that the opinion so states, but thereafter the court says: "So far as the record shows the two are strangers." From the latter remark, it is fair to conclude that the record before the appellate court in that case, and upon which it was being tried, nowhere showed the fact that the plaintiff was the wife of defendant in the execution. At any rate the opinion throughout proceeds as though the parties were strangers, and the case is disposed of on that theory, following *Payne v. Savings Trust Company*, *supra*, where the parties to the record were not husband and wife.

In the instant case the record before us does not show that in any of the proceedings in the case wherein the execution was issued it appeared that these parties were husband and wife. Such fact would not be expected to so appear. The debt is said to be the sole debt of the husband. He was sued therefor and a judgment obtained against him. Execution was levied upon the property described in the petition herein, as being his property, or upon the theory that he had an interest therein subject to execution. The fact that the true owner of the property was his wife would not be expected to appear anywhere in that proceeding. This record, however, does show, and the demurrer admits, that the parties are husband and wife, and that the property is the sole and separate property of the wife, this plaintiff; that it has been seized under execution for the husband's debt, and that a sale thereof is threatened to satisfy such execution. And the question, squarely presented, is whether or not, in the present state of our law, equity will prevent the seizure and sale of the sole and separate property of a wife under an execution issued upon a judgment obtained against the husband for his individual debt. We think that it will, and that the decision herein is not in conflict with that in *Taylor v. Swearingen*.

Further reasons are urged why we should grant respondents a rehearing. We have carefully examined all of them, but they have not caused us to alter our views expressed above. With the concurrence of the other judges, the motion for rehearing is overruled.

FRANK B. COLEMAN, Trustee, Respondent, v,
CHARLES T. DANA, Appellant.

St. Louis Court of Appeals, May 4, 1915.

1. **BANKRUPTCY: Setting Aside Nonfraudulent Transfers: Right of Action by Trustee.** Under the Bankruptcy Act of July 1, 1898 (Ch. 541, sec. 70, 30 Stat. at Large, 565), providing that the trustee in bankruptcy shall be vested with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all property transferred by him in fraud of creditors, and authorizing him to avoid any transfer by the bankrupt which any creditor might have avoided, and recover the property so transferred, or its value, a trustee is vested with title to property transferred by the bankrupt only where the transfer is in fraud of the bankrupt's creditors, and may avoid a transfer by the bankrupt only when a creditor, in a proper proceeding, might have avoided it in his own favor; and hence a trustee in bankruptcy of a corporation, which had purchased its own stock with corporate funds, may not recover from the seller on mere proof that the seller knew, or had reasonable grounds to believe, that corporate funds were used for the purchase of the stock, but he must show that the payment for the stock was fraudulent as against creditors of the corporation.
2. **APPELLATE PRACTICE: Disposition of Case on Appeal: Findings.** The appellate court cannot find facts essential to sustain a judgment rendered under an erroneous view of the law by the trial court, which did not find such facts.

Appeal from St. Louis City Circuit Court.—*Hon.*
William M. Kinsey, Judge.

REVERSED AND REMANDED.

Eugene C. Tittmann for appellant.

(1) In order to recover funds of a corporation paid by an officer of the corporation and alleged to have been misappropriated, it must be conclusively shown that the one so receiving the funds had knowledge of the fact that the funds so received were funds of the corporation. *Roan v. Winn*, 93 Mo. 503; *St. Charles Saving Bank v. Edwards*, 243 Mo. 553; *Coleman, trustee, v. Stocke*, 159 Mo. App. 43. (2) All the stockholders of a corporation may consent to an appropriation of an asset by an official if the appropriation would not work a detriment to creditors. There is no evidence in the suit at issue to show any detriment to creditors. *Jorndt v. Hub & Spoke Co.*, 112 Mo. App. 341; *Coleman, trustee, v. Stocke*, 159 Mo. App. 43; *Coleman, trustee, v. Hagey*, 252 Mo. 102; *Warren v. Mayer Fertilizer & Junk Co.*, 145 Mo. App. 558. (3) Before a trustee in bankruptcy can recover funds of a corporation alleged have been misappropriated by an officer of the corporation it must be shown that the corporation was insolvent at the time of the alleged misappropriation as the assets of a corporation do not become a trust fund for the benefit of creditors until insolvency and this fact must be proven. *Jorndt v. Hub & Spoke Co.*, 112 Mo. App. 341; *Hageman v. Railroads*, 202 Mo. 249; *Milling Co. v. Commission Co.*, 128 Mo. 473; *Coleman, trustee v. Hagey*, 252 Mo. 102. (4) Fact of bankruptcy is no evidence that the company was insolvent at a prior date. *Swartz v. Frank*, 193 Mo. 438. (5) A trustee in bankruptcy is vested with the title of the bankrupt to all property transferred by the bankrupt in fraud of creditors, and to all property which, before the filing of the petition in bankruptcy, might have been levied on and sold by judicial process against the bankrupt; the trustee may avoid any transfer by the bankrupt of his property, which any creditor of the bankrupt might have avoided, and may

recover the property so transferred or its value. He cannot avoid a transfer unless some creditor, by proper proceeding, might have avoided it in his own favor. Coleman, trustee, v. Hagey, 252 Mo. 102, 122; National Bankrupt Laws, 1898, secs. 70a and 70e.

Lee W. Grant and Leahy, Saunders & Barth for respondent.

(1) The law is well settled in this State that a corporation cannot purchase its own stock because the statute itself provides the only way in which a corporation can reduce the amount of its capital stock. Boley v. Development Co., 126 Mo. App. 116, and cases cited; St. Louis Raw Hide Co. v. Hill, 72 Mo. App. 142; Roan v. Winn, 93 Mo. 503; St. Louis Carriage Mfg. Co. v. Hilbert, 24 Mo. App. 338. (2) The funds of a corporation cannot be used for the private purposes of an officer thereof. The person receiving the benefit of such use of the funds, who knows or who has reasonable grounds to believe that to be the fact, or who is put upon notice and could by inquiry ascertain such fact, is liable to the corporation. Bank v. Edwards, 243 Mo. 553; Bank v. Orthwein Co., 160 Mo. App. 369; Coleman v. Stocke, 159 Mo. App. 43.

ALLEN, J.—This is an action instituted by the plaintiff, trustee in bankruptcy of the George D. Allen Paper Company, a corporation, to recover from defendant the sum of \$2137 alleged to have been paid defendant out of the corporate funds of said corporation in the purchase of certain shares of its capital stock.

The petition avers that on February 8, 1911, a petition in bankruptcy was filed against the corporation by sundry creditors, and that on February 28, 1911, it was duly adjudicated a bankrupt, and thereafter plaintiff was chosen trustee of the bankrupt estate and had duly qualified and was acting as such. And it is al-

leged that on September 20, 1910, the defendant was, and had for a long time prior thereto been, the owner of certain shares of the capital stock of such corporation, and was on the day last mentioned also a director thereof; that on said day the corporation, being then insolvent, purchased from defendant the shares of stock so owned by him, for the price and sum of \$2137, which was paid to defendant by said corporation; "that defendant knew that the said moneys paid to and received by him were funds belonging to the said George D. Allen Paper Company;" and that by reason of the premises defendant became liable to the corporation, or to this plaintiff as trustee in bankruptcy thereof, for the repayment of said sum, for which judgment is prayed.

The answer admits the adjudication in bankruptcy and the election of plaintiff as trustee of the bankrupt's estate, states that in the year 1910 defendant owned an equity in certain shares of stock in the corporation, and denies generally the other allegations of the petition.

The trial before the court, without the intervention of a jury, resulted in a finding for plaintiff and judgment in his favor in the sum of \$2222, from which defendant prosecutes this appeal.

The evidence adduced tends to show that the defendant had been connected with the corporation in question for a period of about fourteen years, being in its employ as a salesman; and that in June, 1910, he became a director and vice-president thereof. On August 29, 1910, he severed his connection with the company. He testified that he was "fired" at this time because he refused to sign the minutes of a director's meeting, without being permitted to read them. Whether or not he actually resigned as an officer and director does not clearly appear. The company was originally the Garnett & Allen Paper Company, its name having been later changed. Seven or eight

years prior to the transaction here in question defendant purchased some stock in the company for a part of the purchase price of which he gave his personal notes, one to Mr. Allen and one to Mr. Garnett, officers of the company, indorsing the stock over as collateral security for the payment of such notes. It is said that later Mr. Allen, who was president during the period with which we are concerned, acquired the stock originally held by Mr. Garnett. It appears that these notes were in fact turned over to the company and carried by it as bills receivable; and the matter remained in this shape up to September 20, 1910.

Shortly prior to the last-mentioned date defendant having then been out of the company's employ less than a month, came into possession of a letter of date March 8, 1910, written by Allen, as president of the corporation, to one of its customers, from which it appeared that large sums of money had been improperly diverted from the company's treasury. Defendant thereupon consulted an attorney, who demanded of Allen permission to inspect, for his client, the corporation's books. This demand was not complied with; and it appears that defendant's said counsel met Allen and the latter's counsel, and after some discussion Allen agreed to purchase defendant's stock for the sum of \$2137; and on the following day the sale was consummated. Defendant signed a receipt acknowledging the receipt of \$2137 from the corporation, "in full payment of all demands, including salary." There is testimony, however, to the effect that the receipt was thus drawn at the request of Allen for the reason that defendant had claimed a small balance due on salary account. It appears that defendant's counsel refused an uncertified check of the corporation in payment of the stock, demanding cash; and that thereupon Allen obtained a check of the corporation which he cashed and with the proceeds paid to defendant's attorney the amount agreed upon. And the evi-

dence is that after this transaction with defendant the corporation carried the stock, which had thus been purchased from defendant, as "treasury stock."

The court refused a number of declarations of law requested by plaintiff and gave two of its own motion. The first of these proceeds upon the theory that in order to find for plaintiff it was sufficient to find that the money paid by Allen to defendant for the stock came out of the funds of the corporation, that Allen had no authority to use such funds other than his general authority as president of the corporation, and that the defendant either knew or had reasonable ground to believe that the money thus paid to him was money belonging to the corporation.

The second declaration of law is as follows: "The court declares, as a matter of law, that it is not necessary to a recovery by plaintiff under the facts hypothesized in the foregoing instruction that plaintiff should either allege or prove that said corporation was insolvent on the 20th day of September, 1910, and that defendant knew, or had reasonable ground to believe that such was the fact."

The evidence establishes beyond doubt that funds of the corporation were used to purchase from defendant the stock in question. And there is ample evidence to sustain a finding that defendant knew, or had reasonable ground to believe, that such was the fact. The trial court rendered judgment for plaintiff upon the theory that, with these facts established, the trustee in bankruptcy was entitled to recover back the monies of the corporation thus expended. But we think that the court erred in holding that in order for plaintiff to recover it was unnecessary to allege and prove anything beyond facts hypothesized in the first declaration of law. The theory pursued by the learned trial judge might be well enough were it a case where the corporation itself, or its stockholders in a proper case, repudiating an unauthorized act of an officer of the corpora-

tion in diverting its funds for the purchase of its stock, sought to recover the funds thus diverted. But the case before us proceeds upon the theory that the corporation purchased the stock. The petition so avers; and plaintiff's evidence tends to so show. The company issued its check to pay the amount agreed to be paid defendant, acquired the stock, and thereafter, until bankruptcy intervened, carried the same upon its books as treasury stock. Under the circumstances we are of the opinion that the trustee cannot maintain this action without pleading and establishing facts which would have entitled creditors of the corporation to assail the transaction as being in fraud of their rights.

Section 70 of the Bankrupt Act (30 Stat. L. 565) provides that the trustee shall "be vested by operation of law with the title of the bankrupt as of the day he was adjudged a bankrupt, . . . to all property transferred by him in fraud of his creditors." And section 70e provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value," etc. The trustee is vested with title to property transferred by the bankrupt only where such transfer is in fraud of the bankrupt's creditors, and may avoid a transfer by the bankrupt only when some creditor, in a proper proceeding, might have avoided it in his own favor. [See *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829; *Mayhew v. Todisman*, 246 Mo. 288, 151 S. W. 436; *Blake v. Meadows*, 225 Mo. 1. c. 46, 123 S. W. 868; *In re Economical Printing Co.*, 110 Fed. 514; *In re Mullen*, 101 Fed. 413.]

The decision of this court in *Coleman, Trustee, v. Stocke*, 159 Mo. App. 43, 139 S. W. 216, in part relied upon by respondent, is not out of harmony with the cases cited above, for there the corporation in question was insolvent, and the transaction involved was one in fraud of its creditors. There was therefore no

question as to the right of the trustee in bankruptcy to maintain the action.

It is urged that the judgment should be in any event affirmed for the reason that there is ample evidence to show that the corporation was insolvent at the time of the transaction involved, and that the payment to defendant was in fraud of the rights of creditors. But it is altogether clear that we, as an appellate court, could not find such to be the facts, and affirm this judgment upon the record before us.

The judgment will therefore be reversed and the cause remanded, with leave to respondent to amend his petition if so advised. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

L. W. HEAGY, Appellant, v. J. F. COX, Respondent.

St. Louis Court of Appeals, June 8, 1915.

CONTRACTS: Explanation of Consideration Clause: Parol Evidence. The consideration clause of an assignment of a contract, reciting that, "for value received," the contract was assigned, was not contractual in its nature, and hence was open to explanation by parol, so that the assignee, who, by the terms of the assignment, assumed the obligations of the assignor under the contract, had the right to maintain an action to recover an amount which he claimed the assignor agreed to pay him as consideration for the assignment.

Appeal from Iron Circuit Court.—*Hon. E. M. Dearing*, Judge.

REVERSED AND REMANDED.

George Munger and *O. L. Munger* for appellant.

(1) Since this suit is based upon an Indiana contract we think the *lex loci contractus* governs. 9 Cyc.

672; *Johnson v. Gawtry*, 83 Mo. 339; *Kerwin v. Doran*, 29 Mo. App. 397. (2) This suit being between the immediate parties the actual consideration can be inquired into by parol. *R. S. Ind.*, 1908, sec. 7464; *Rock hill v. Spraggs*, 9 Ind. 30; *McMahon v. Stewart*, 23 Ind. 590; *Jones v. Noe*, 71 Ind. 368; *Levering v. Shockey*, 100 Ind. 558; *Cuthrell v. Cuthrell*, 101 Ind. 375; *Hayes v. Peck*, 107 Ind. 389; *Buscher v. Knapp*, 107 Ind. 340; *Rabsuhl v. Lack*, 35 Mo. 316; *Fontaine v. Bank*, 57 Mo. 561; *McConnell v. Brayner*, 63 Mo. 461. (3) The contract sued on was an oral one, only a portion of which was reduced to writing. Hence, the unwritten portion can be proven by parol evidence, and can be enforced at law. *Headrick v. Wiseheart*, 57 Ind. 129; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 338; *Bever v. Bever*, 144 Ind. 157; *Lowry v. Downey*, 150 Ind. 364; *Penn. Co. v. Dolan*, 6 Ind. App. 109; *Rollins v. Claybrook*, 22 Mo. 405; *Moss v. Green*, 41 Mo. 390; *O'Neil v. Crain*, 67 Mo. 250; *Black R. Lbr. Co. v. Warner*, 93 Mo. 374; *Harvey Lbr. Co. v. Herriman Lbr. Co.*, 39 Mo. App. 214. (4) The unperformed portion of the contract sued on is in addition to and consistent with the assignment. Hence, it is provable by parol and enforceable at law. *Stearns v. Dubois*, 55 Ind. 257; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 338; *Lowry v. Downey*, 150 Ind. 364; *Maris v. Iles*, 3 Ind. App. 579; *Laudman v. Ingram*, 49 Mo. 212; *McConnell v. Brayner*, 63 Mo. 461; *Hickman v. Hickman*, 55 Mo. App. 303; *Pickett v. Mercer*, 106 Mo. App. 689. (5) Where a written contract does not purport to contain all the stipulations between the parties, parol evidence is permissible to show additional stipulations if not inconsistent with the writing. *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334; *Lash v. Parlin*, 78 Mo. 391; *Ellis v. Bray*, 79 Mo. 227; *Gardner v. Mathews*, 81 Mo. 627; *Miller v. Goodrich Bros.*, 53 Mo. App. 430. (6) If this contract is not a parol contract with a portion only reduced to writing, as contended in paragraph 3 of this brief, then the

contract sued on is a distinct collateral contemporaneous agreement independent of and not varying the written contract of assignment, and may be shown by parol and recovered upon. *Bowen v. Bowen*, 90 Mo. 184.

J. L. Fort and J. M. Cook for respondent.

(1) The contract being in writing, and there being no pretense to fraud, accident or mistake, is conclusively presumed to contain the entire agreement of the parties. *Boggs v. Company*, 171 Mo. 282; *Dexter v. McDonald*, 196 Mo. 373; *Jackson v. Company*, 54 Mo. App. 636; *Metropolitan v. Company*, 137 S. W. 633. The law may or may not have required the assignment of this contract to have been in writing, but whether it did require it or not, it was in fact made in writing. And having been reduced to writing the law not only presumes, but conclusively presumes, that the written contract is the receptacle for and contained all the terms of the agreement, and prevents the introduction of parol evidence in any manner to change, add to or take from the written contract, except where the written contract itself shows upon its face that parts of it were omitted therefrom. *Reigart v. Company*, 217 Mo. 154. There is nothing on the face of the written contract of assignment, signed by defendant in writing and accepted by plaintiff in writing which shows than any part of the contract was omitted therefrom, hence parol testimony was not admissible to show prior agreement between the plaintiff and defendant by which defendant promised to pay plaintiff \$2000 in addition to the consideration specified in the assignment. (2) When the consideration specified in the written assignment is examined in connection with the consideration specified in the contract assigned, it is plain that Cox as the original contractor, and after him Heagy, his assignee, was to get 5061

shares of the capital stock of the company for paying the debt and erecting the improvements specified in the assigned contract. In other words the consideration is clearly and unequivocally contractual. Mr. Elliot in his work on 1 Evidence, sec. 582, says: "So, the recital of consideration in a writing is generally a mere formal matter, which is regarded as in the nature of a receipt, and may be varied or contradicted by parol evidence. But when these reasons do not apply to the particular written contract in question, as, for instance, when the consideration is contractual, parol evidence thereof is generally inadmissible, the right to introduce parol evidence to vary the consideration expressed in the instrument or to prove that it was never paid does not authorize the introduction of such evidence to defeat or change the contract itself." *Laclede Co. v. Freudenstein*, 179 Mo. App. 175; *Welsh v. Edmission*, 46 Mo. App. 282; *Blakely v. Benecke*, 59 Mo. 193; *Montany v. Brock*, 10 Mo. 506; *Slattery v. Bates*, 8 Mo. App. 595; *State v. Hoshaw*, 98 Mo. 358; *Halferty v. Scearce*, 135 Mo. 428; *Culbertson v. Young*, 86 Mo. App. 277; *Williams v. Company*, 85 Mo. App. 103; *Davis v. Gaun*, 63 Mo. App. 425; *Klein v. Isaacs*, 8 Mo. App. 568; *Williams v. Company*, 158 S. W. 967; *Co. v. Grate*, 102 N. E. 155; *Bluoner v. Schmidt*, 146 N. W. 751; *Goldenberg v. Taglins*, 105 N. E. 883; *Gill v. Ruggles*, 81 S. E. 519; *Luckenbach v. Thomas*, 166 S. W. 99; 17 Cyc. 632, 635, 661; *Schneider v. Turner*, 130 Ill. 28; *Stillings v. Timmins*, 25 N. E. 50; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460; *Barter v. Greenleaf*, 65 Me. 405; *Ruggles v. Clare*, 26 Pac. 25; *Morse v. Shuttuck*, 17 Am. Dec. 419; *Belden v. Seymour*, 21 Am. Dec. 661; *Reisterer v. Carpenter*, 24 N. E. 371; *Baum v. Lynn*, 18 So. 428; *Gelpcke v. Blake*, 19 Iowa, 263; *Hendrick v. Crowley*, 31 Cal. 471; *Jackson v. Company*, 54 Mo. App. 636; *McDaniel v. Company*, 148 S. W. 464; *Metropolitan v. Company*, 137 S. W. 633.

ALLEN, J.—This is an action to recover the sum of \$2000 which it is alleged the defendant agreed to pay plaintiff in consideration of the agreement and undertaking by plaintiff to fulfill, in defendant's stead, the terms of a certain written contract existing between defendant and a corporation, the written contract having been assigned by defendant to plaintiff, the latter assuming all of the obligations of defendant thereunder and becoming entitled to the benefits thereof. The cause was tried by the court without the intervention of a jury, resulting in a judgment for the defendant from which plaintiff prosecutes this appeal.

On December 10, 1906, the defendant entered into a contract in writing with the Grand Valley Land and Mineral Company, a corporation, whereby defendant agreed to do certain irrigation and reclamation work in the State of Utah and to assume and pay certain liabilities of the corporation amounting to approximately \$15,000, for which he was to receive a certain amount of the capital stock of the corporation. Defendant did not complete the work under this contract, and did not pay the liabilities of the corporation so assumed by him; and on February 4, 1907, this contract was assigned to plaintiff by the following assignment indorsed thereon, viz:

"For value received the within contract and all of our rights thereunder are hereby assigned, sold and transferred to L. W. Heagy, who, by the acceptance thereof, assumes all our liabilities thereunder. It is the intention however that the contract between the undersigned C. C. Brown and the Grand Valley Land and Mineral Company mentioned in page three of this contract shall remain in force, and said Heagy hereby assumes the carrying out of the same as in said contract agreed by J. F. Cox."

This assignment was signed by defendant and C. C. Brown, named therein, and accepted in writing by plaintiff. Brown was not directly a party to the orig-

inal contract, but was in the corporation's employ and the contract provided that defendant would continue the employment.

Plaintiff's evidence goes to show that the contract between him and the defendant, by virtue of which this assignment was made, consisted of an oral agreement which was never reduced to writing. The testimony adduced in plaintiff's behalf tends to show that the defendant, admitting his inability to carry out the terms of his contract with the corporation, agreed, among other things, to advance and pay to plaintiff the sum of \$2000 if the latter would assume all of his obligations thereunder. This appears from plaintiff's testimony and that of two witnesses who were present at the time. Defendant's evidence consists of some brief testimony on his part, and the written contract between defendant and the corporation with the above-mentioned assignment endorsed thereon. Defendant was asked by his counsel whether "there was ever any consideration passed" between him and plaintiff other than that mentioned in the written assignment, and he answered: "There was not." This was all of defendant's testimony in chief relative to the transaction, and he was not cross-examined by plaintiff's counsel.

At the close of the case the court gave a declaration of law declaring that "the consideration expressed in said assignment is, and was, contractual, and that the contractual quality of said consideration must be ascertained by an examination of the consideration expressed in the assignment and in the contract assigned. and if the court shall find from the evidence that the two thousand dollars sued for in this cause was not, and is not, mentioned or described in said contract or assignment nor in said assigned contract, the finding of the court will be for the defendant."

From this it appears that the court took an erroneous view of the law applicable to the matter in hand, necessitating a reversal of the judgment.

Plaintiff is not suing either upon the written contract between the corporation and defendant, or upon the assignment endorsed thereon. Manifestly the assignment was made pursuant to some agreement between plaintiff and defendant, and it is this that plaintiff seeks to enforce. The assignment does not purport to constitute the full contract between the parties. Its office was merely to formally transfer to plaintiff defendant's rights under the written contract upon which it was endorsed, and to charge plaintiff with defendant's liabilities thereunder. It recites that it was executed by defendant "for value received;" but it does not in fact set forth any consideration flowing from either party to the other. It is true that plaintiff, by virtue of the assignment succeeded to defendant's rights under the contract (the corporation consenting thereto), and that plaintiff's assumption of the liabilities imposed upon defendant by the contract constituted a consideration moving to the latter. But it by no means follows that these were the only considerations present. What was the real contract between these parties, under and by virtue of which defendant executed the assignment and plaintiff accepted it, the writing itself does not disclose. The assignment merely recites that defendant received some consideration for its execution; and in so far as it evidences the contract between plaintiff and defendant the consideration clause thereof is open to explanation by parol. [See *Goddman v. Griffith*, 238 Mo. l. c. 714, 715, 142 S. W. 259; *Bank v. Bank*, 244 Mo. 575, 149 S. W. 495; *McDaniel v. United Railways Co.*, 165 Mo. App. 678, 148 S. W. 464.]

This is not a case where the consideration clause of an instrument becomes contractual in its nature, i. e. "leaves the field of mere recital and enters that

of contract, thereby creating and attesting rights as shown by the intention of the parties to be gathered from the instrument," and hence is not open to contradiction by extrinsic evidence. [See *Laundry Co. v. Freudenstein*, 179 Mo. App. 175, 161 S. W. 593; *McDaniel v. United Railways Co.* supra.] The only writing between these parties is the mere assignment of the original contract by defendant, "for value received," accepted by plaintiff. It is clear that this does not preclude parol proof of the real contract between them.

The judgment is reversed and the cause remanded. *Reynolds, P. J., and Nortoni, J., concur.*

ALICE JAGGI, Respondent, v. PRUDENTIAL
INSURANCE COMPANY OF AMERICA, Ap-
pellant.

St. Louis Court of Appeals, June 8, 1915.

1. **APPELLATE PRACTICE:** Review: Rulings on Demurrer to Evidence. In reviewing the refusal of the trial court to direct a verdict for defendant, the appellate court must view the evidence in the light most favorable to plaintiff.
2. **INSURANCE: Forfeiture: Waiver.** The law does not favor forfeitures, and where there is substantial evidence of facts from which it may be found that an insurer has waived a forfeiture clause in a policy issued by it, the matter is for the jury, under appropriate instructions.
3. **LIFE INSURANCE: Forfeiture: Waiver by Retention of Premiums.** Where the beneficiary of a life insurance policy paid premiums thereon, after nonpayment for a sufficient period to cause the policy to lapse, without furnishing evidence of the insurability of insured, as required by the policy, and insurer retained the same, insurer was precluded from insisting upon a forfeiture, since it could not retain the benefits and at the same time be permitted to deny the existence of the contract; and the fact that insurer's agent, in accepting the payments, gave a temporary receipt, stating that it was given on condi-

Jaggi v. Prudential Insurance Co.

tion that insurer would not be liable on the policy unless it was in force when the payments were made, did not alter the situation; and likewise a tender of such premiums into court, after action was brought on the policy, was unavailing, because too late.

4. **INSURANCE: Damages for Vexatious Refusal to Pay: Question for a Jury.** The question of whether an insurer is chargeable with vexatious delay in refusing to pay a loss, rendering it liable, under Sec. 7068, R. S. 1909, for damages and an attorney's fee, is for the jury only when, from a general survey of all the facts and circumstances of the case, an inference can be drawn that the refusal was unjustifiable and vexatious.
5. ———: ———: **Sufficiency of Evidence.** In an action on a life insurance policy, defended on the ground that the policy had lapsed prior to the death of the insured by reason of non-payment of premiums, evidence that the beneficiary had paid premiums, but without furnishing insurer evidence of the insurability of insured, as required by the policy, and that insurer retained the premiums, thereby waiving the forfeiture, that formal demand for payment, with proof of death, was made on insurer, but payment was not made, was sufficient to warrant a finding that insurer had vexatiously refused to pay, justifying the allowance of an attorney's fee for plaintiff, under Sec. 7068, R. S. 1909.
6. **JUSTICES' COURTS: Appeal to Circuit Court: Questioning Plaintiff's Capacity to Sue.** On appeal to the circuit court from a justice's court, defendant does not, by failing to demur, waive the right to question plaintiff's capacity to sue.
7. ———: **Pleading: Effect of Appearance.** The appearance of the defendant in a justice's court raises the general issue.
8. **APPELLATE PRACTICE: Binding Effect of Trial Theory.** Even where a cause originates in a justice's court, a party cannot try his case on one theory in the circuit court, on appeal from the justice, and on another theory in the Court of Appeals.
9. ———: ———: **Life Insurance.** In an action on an industrial life insurance policy, instituted in a justice's court and appealed to the circuit court, where it was tried *de novo*, insurer not having, in the latter court, raised the point that plaintiff was not within any of the classes in the "facility of payment" clause in the policy and hence had no capacity to sue, would not be heard on such point in the Court of Appeals.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm, Judge.*

AFFIRMED.

Fordyce, Holliday & White for appellant.

(1) This case should be reversed because of the failure of the court below to give defendant's instruction in the nature of a demurrer to the evidence, for: (a) The plaintiff was not a designated beneficiary nor did she fall within any of the classes named in the facility of payment clause. *Floyd v. Prudential Ins. Co.*, 72 Mo. App. 455, 459-60; *Kelly v. Prudential Ins. Co.*, 148 Mo. 249; *Ferretti v. Prud. Ins. Co.*, 97 N. Y. 1007; *Wokal v. Belsky*, 53 N. Y. App. Div. 167, 65 N. Y. Supp. 815; *Golden v. Met. Life Ins. Co.*, 35 N. Y. App. Div. 569, 55 N. Y. Supp. 143. (b) Proof clearly showed that the policy was lapsed and not in force on the date of the death of the insured. *Lick v. Insurance Co.*, 79 Mo. App. 609; *Gruwell v. Nat'l. Council, etc.*, 126 Mo. App. 496, 504; *Barnes v. Continental Ins. Co.*, 30 Mo. App. 539; *Ashbrook v. Insurance Co.*, 94 Mo. 72; *Moon-ey v. Home Ins. Co.*, 72 Mo. App. 92; *Smoot v. Life Assn.*, 138 Mo. App. 438; *Gateman v. American Life Ins. Co.*, 1 Mo. App. 300; 25 Cyc., 868-871; *Stiepel v. German Am. Assn.*, 55 Mo. App. 224; *Floyd v. Prud. Ins. Co.*, 72 Mo. 455; 25 Cyc., pp. 860-861; *Wagaman v. Security Mut. L.*, 110 Mo. App. 616; *Ashbrook v. Insurance Co.*, 94 Mo. 672; *Howard v. Mut. Benefit Ins. Co.*, 6 Mo. App. 577; *McGeehan v. Mut. Life Ins. Co.*, 131 Mo. App. 417; *Leeper v. Franklin Life Ins. Co.*, 93 Mo. App. 602; *Suess v. Imperial Life Ins. Co.*, 193 Mo. 564; *James v. Mutual Reserve Life Assn.*, 148 Mo. 1; *Wichman v. Insurance Co.*, 120 Mo. 58; *Richards v. Insurance Co.*, 68 Mo. 590; 25 Cyc., pages 824, 848, 871-72. (2) The court erred in admitting testimony as to conversations between the insured and the agent at the time the application for the policy was rendered. *Embree v. Insurance Co.*, 62 Mo. App. 132; *Hurr v. Railroad*, 141 Mo. App. 217; *Minnesota Thresh-*

Jaggi v. Prudential Insurance Co.

er Mfg. Co. v. Lbr. & Hdw. Co., 81 Mo. App. 255; Rhodus v. Kansas City Life Ins. Co., 156 Mo. App. 281, 284; Gresham v. National Life Ins. Co., 130 Mo. App. 57. (3) The court erred in refusing to admit defendant's evidence as to the steps necessary to revive the policy. 17 Cyc., pages 639, 668; Sanders v. Agricultural Ins. Co., 39 N. Y. App. Div. 631, 57 N. Y. Supp. 683; Carr v. Jones, 29 Wash. 78, 69 Pac. 646; Willis v. Fernald, 33 N. J. 206. (4) The court erred in giving plaintiff's instruction number 1. See authorities under point 1a. (5) The court erred in refusing defendant's instructions 2, 3 and 4. Farmers v. A. O. U. W., 150 Mo. App. 347; Stiepel v. German American Assn. Co., 55 Mo. App. 224; Wagaman v. Life Ins. Co., 110 Mo. App. 616; Ashbrook v. Life Ins. Co., 94 Mo. 672; Garber v. Globe Mut. Life Ins. Co., 9 Fed. Cas. 1146; Aetna Life Ins. Co. v. Bradway, 90 Ill. App. 576; Marshall v. Women's Mut. Ins. Co., 58 N. Y. Sup. 406, 11 N. Y. Supp. 700; 3 Cooley, Briefs on Insurance, page 2398; authorities under point 1b.

James J. O'Donohoe for respondent.

(1) The plaintiff is the proper party to bring this action. Wallace v. Insurance Co., 174 Mo. App. 110; Renfro v. Insurance Co., 148 Mo. App. 258; Floyd v. Insurance Co., 72 Mo. App. 455; Wilkinson v. Insurance Co., 64 Mo. App. 172; Wilkinson v. Insurance Co., 63 Mo. App. 404; Thomas v. Insurance Co., 158 Ind. 463; McCarthy v. Insurance Co., 162 Mass. 254; Insurance Co. v. Young, 43 N. E. 253; Insurance Co. v. Galvin, 24 Ky. 444; 68 S. W. 655; Pfaff v. Insurance Co., 141 Pa. 562; Brennan v. Insurance Co., 170 Pa. 488; Insurance Co. v. O'Farrell, 64 Kan. 278; Insurance Co. v. Schaffer, 50 N. J. 72; Brooks v. Insurance Co., 70 N. J. 36. Parol evidence was admissible to show to whom the proceeds of the policy would be paid in the event of the insured's death. Wallace v. Insurance

Co., 174 Mo. App. 110; Renfro v. Insurance Co., 148 Mo. App. 258. Want of interest or capacity to sue can be raised only by demurrer, answer or other plea, and if not so raised are waived. Barber Asphalt Pav. Co. v. Young, 94 Mo. App. 204; State ex rel. v. Hunter, 46 Mo. App. 616; Beck v. Haas, 31 Mo. App. 180. A cause must be heard in the appellate court upon the same theory as that upon which it was tried in the trial court. St. Louis v. Wright Contracting Co., 210 Mo. 502; Laclede Nat. Bank v. Richardson, 156 Mo. 270. Upon the death of the insured, the defendant construed the policy to mean that the proceeds thereof should be paid to the plaintiff, and, having so interpreted its own contract, it is bound thereby. Andrews v. Insurance Co., 168 Mo. 166, 167; Rogers v. Indemnity Co., 173 S. W. (Mo.), 1089; Myton v. Fidelity & Casualty Co., 117 Mo. App. 442; Fuller Bros. v. Fidelity & Casualty Co., 94 Mo. App. 490. The question of insurable interest is not involved under the facts in the case. Locher v. Knechenmiester, 120 Mo. App. 701; Deal v. Hainley, 135 Mo. App. 507. (2) The policy was in force when the insured died and the court did not err in failing to give the instructions refused. The instructions given were correct and accurate. Andrus v. Insurance Co., 168 Mo. 151; Wichman v. Insurance Co., 120 Mo. App. 51; Reed v. Bankers' Union, 121 Mo. App. 419; Francis v. A. O. U. W., 150 Mo. App. 347; Godwin v. K. & L. of S., 166 Mo. App. 289; Nichols v. Insurance Co., 170 Mo. App. 437; Keys v. K. & L. of S., 174 Mo. App. 671; Manning v. Insurance Co., 176 Mo. App. 678. (3) Damages and attorney's fee were properly and accurately submitted. Stix v. Indemnity Co., 175 Mo. App. 175; Cox v. Insurance Co., 154 Mo. App. 464; Keller v. Insurance Co., 198 Mo. 440.

ALLEN, J.—This is a suit upon a policy of insurance—what is ordinarily termed an industrial policy—issued January 31, 1910, insuring the life of one Fred-

erick Beckley in the sum of \$177. The insured died February 21, 1912, and this suit was instituted June 4, 1912. The cause originated before a justice of the peace, and found its way to the circuit court where upon a trial *de novo*, before the court and a jury, there was a verdict for plaintiff for the amount of the policy with interest, together with an attorney's fee of \$50, making a total of \$235.99. From a judgment rendered upon such verdict the defendant prosecutes this appeal.

The defense below was that the policy had lapsed for nonpayment of premiums according to its terms, and was not in force at the time of the death of the insured. It appears that the premiums were paid by plaintiff, the insured giving her the money therefor, up to December 4, 1911, after which date no premiums were paid until February 16, 1912. On the latter date plaintiff went to the office of the company in the city of St. Louis and paid \$1.65, being the amount of the unpaid premiums then due. This sum was accepted by the defendant, plaintiff being given a "temporary receipt" which stated that the same was given upon the condition that the company would under no circumstances be liable under the policy unless it was in force in accordance with its terms when the said payment was made. The policy provides for a forfeiture if the premiums be in arrears for a period of more than four weeks; and that if the policy be lapsed for nonpayment of premiums it will be revived within one year from the date to which premiums have been paid, upon the payment of all arrears, provided evidence of the insurability of the insured satisfactory to the company be furnished it. And it appears that defendant's agents in the city of St. Louis entered the insured's name and the policy number upon its "lapsed policy schedule," and made a report to the home office of the company to the effect that the policy had become lapsed.

There is a sharp conflict in the testimony relative to plaintiff's transaction with the company in respect to the retention of the \$1.65 above mentioned. Plaintiff's testimony is that the agent who ordinarily collected the premiums would not enter it in the receipt book held by her, assigning as a reason therefor the fact that the transaction had been had at the company's office, but gave her no further information; that she (plaintiff) was not informed that the company regarded the policy as lapsed or that there was any necessity of reviving it, and that she was entirely ignorant thereof. She further testified that she had never been tendered back the premiums so paid. During the trial defendant's counsel made formal tender of the premiums into court.

Further details of the evidence need not be stated, since the main question before us pertains to the ruling below upon the demurrer to the evidence, and for the purposes thereof the evidence is to be viewed in the light most favorable to plaintiff.

The trial court held, in effect, that plaintiff's evidence, if true, showed a state of facts such as to preclude the defendant from insisting upon a forfeiture of the policy. This holding we think was correct. The case made by plaintiff is one where the insurance company, with knowledge of the forfeiture, has accepted and retained the premiums for the nonpayment of which it is attempting to forfeit the policy. Manifestly its tender into court at the time of the trial would come too late, and avail it nothing. And if defendant so retained the premiums, it would matter not that it entered insured's name and policy number upon its lapsed policy schedule; nor would the conditional receipt given plaintiff afford it any protection. In *Andrus v. Insurance Assn.*, 168 Mo. l. c. 165, 166, 67 S. W. 582, of such a receipt it is said:

"The conditional receipt in use by the company is a snare in itself. It acknowledges receipt of the

money. It keeps the money, but it says the policy is not reinstated by the acceptance of the money and shall continue to be null and void until the health certificate is filed, and until the president and medical director determine to reinstate the policy. The company must take one horn of the dilemma or the other. It cannot retain the benefits and deny the existence of the contract. If it does not wish the receipt of the premiums to have the effect in law of reinstating the policy or of preventing a forfeiture, it must refuse to receive the money until the health certificate is filed and until the president and medical director act."

The law does not favor forfeitures; and where, as here, there is substantial evidence of facts from which it may be found that an insurer has waived a forfeiture clause in its policy, the matter is one to be referred to the jury under appropriate instructions. [See *Nichols v. Ins. Co.*, 170 Mo. App. 1. c. 449, 450, 155 S. W. 478; *Francis & Hunter v. A. O. U. W.*, 150 Mo. App. 347, 130 S. W. 500; *Reed v. Bankers' Union*, 121 Mo. App. 419, 99 S. W. 55.]

We therefore hold that the court committed no error in its ruling on the demurrer.

Appellant complains of the action of the trial court in submitting to the jury the question of vexatious refusal to pay; it being urged that there is no evidence to justify the giving of such an instruction. The jury did not award anything by way of damages for vexatious refusal to pay, but, as said above, did allow an attorney's fee of \$50. Section 7068, Revised Statutes 1909, which has so often been before our courts, provides that "in any action against any insurance company . . . if it appear from the evidence that such company has vexatiously refused to pay" the loss a court or jury may allow the plaintiff damages not exceeding ten per cent on the amount of the loss, and a reasonable attorney's fee. Our courts have gone very far in leaving to the discretion of the jury the mat-

ter of awarding such damages and attorneys fees. [See *Keller v. Home Life Ins. Co.*, 198 Mo. l. c. 460, 461, 95 S. W. 903; *Stix v. Indemnity Co.*, 175 Mo. App. l. c. 180, 157 S. W. 870.] However, it is doubtless true that the question of vexatious delay is for the jury only "when from a general survey of all of the facts and circumstances in the case an inference can be drawn that the refusal was unjustifiable and vexatious." [*Patterson v. Insurance Co.*, 174 Mo. App. l. c. 44, 160 S. W. 59; *Keller v. Insurance Co.*, supra, l. c. 460, 461.]

In the case before us there is sufficient, in our judgment, to make the matter one for the jury. It appears that formal demand was made upon the company, with proofs of death, on April 22, 1912. Defendant refused to pay; and the suit was instituted on June 4, 1912. The defendant had accepted the premiums in arrears, and the jury found that it had not tendered them back, whereby it waived the forfeiture. Ample opportunity was afforded defendant to pay the claim without litigation. Under such circumstances its refusal to pay may be found to be without reasonable cause and vexatious.

It is urged that plaintiff is not entitled to maintain this action; that the insurance is payable to the executors and administrators of the insured, who alone may recover on the policy. The policy has "a facility of payment" clause such as was involved in *Wallace v. Insurance Co.*, 174 Mo. App. 110, 157 S. W. 1028, and *Jones v. Insurance Co.*, 173 Mo. App. 1, 155 S. W. 1106, and which has been frequently before our courts. On behalf of plaintiff there was testimony to the effect that the insured requested defendant's agent who wrote the insurance, and with whom alone the insured dealt, to make plaintiff the beneficiary therein; and the testimony of the agent is that he told the insured that "the company had no beneficiary on that policy;" and that "the understanding was that whoever paid the insur-

ance was the beneficiary." As said above, plaintiff regularly paid the insurance with moneys given her by the insured, according to her testimony; though it appears that plaintiff with her own funds paid the \$1.65 above mentioned, paying the premiums for some weeks.

In *Wallace v. Insurance Co.*, supra, following *Jones v. Insurance Co.*, supra, we held that under such a policy as this it was competent, under the circumstances appearing, to show a special agreement with the agent with whom alone the insured dealt, with respect to the payment of the insurance. It is now urged that this plaintiff does not fall within any of the classes mentioned in the facility of payment clause, by reason whereof the case is to be distinguished from the *Wallace* case. We are not prepared to say that this defense would be available to defendant, under all of the circumstances present. This we do not decide, however, for this record fails to disclose that the defendant made this point below. It is true that defendant's counsel objected to the testimony proffered by plaintiff to prove the agreement made with defendant's agent aforesaid, and excepted to the action of the court in admitting the same. But this testimony was competent, at least as far as it went, under the rulings in the *Wallace* and *Jones* cases, supra. Nowhere, so far as this record shows, was the question raised below that plaintiff, as is claimed, did not come within the terms of the facility of payment clause; and it is altogether clear that the trial court in no way passed upon the same. During the trial defendant's counsel announced in open court that his defense was that the policy "was lapsed for nonpayment of the premiums and never revived." The contention is that it was not thereby intended to confine the defense within such limits. The cause was on appeal from a justice of the peace; and it is true that defendant did not waive the right to question plaintiff's capacity to sue by failing to demur. [See *Wendleton v. Kingery*, 110 Mo.

App. 67, 84 S. W. 102.] It does not appear that defendant filed any answer, but its appearance raised the general issue. The record does not show that the defendant at any time or in any way raised below the point that is now urged. Even where the cause originates before a justice of the peace a party cannot try his case on one theory below and upon another theory here. The proceedings at the trial show no reference whatever to the point that plaintiff was not within the terms of the facility of payment clause. Defendant's instructions, both those given and those refused, in no way suggest this question. Neither is there any point made concerning the same in defendant's motion for a new trial.

The cause was tried below by defendant upon the theory that the insurance had become forfeited by failure to pay the premiums; and it was urged that plaintiff was seeking to perpetrate a fraud by a payment of the final premiums which are now held constituting a waiver of the alleged forfeiture. But, as observed by the trial court in its memorandum filed in overruling the motion for new trial, no fraud appears in the case; and the real questions tried out below relate to the waiver of the forfeiture and to the recovery of attorney's fees for vexatious refusal to pay. And these are the questions discussed by the trial judge in his memorandum opinion filed as aforesaid.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

**EVERY PRICE, Respondent, v. HIRAM LLOYD
BUILDING AND CONSTRUCTION COMPANY,
Appellant.**

St. Louis Court of Appeals, June 8, 1915.

1. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work: Questions for Jury.** In an action by an employee for injuries sustained in jumping from a scaffold formed by a narrow plank laid across two stepladders, when a heavy board which he was holding in position toppled over and was about to fall upon him, evidence *held* sufficient to justify a finding that defendant was negligent in furnishing a scaffold which, by reason of its narrowness and insecurity, did not afford a reasonably safe place for plaintiff to do his work; *held, further*, under the evidence, that plaintiff was not guilty of contributory negligence as a matter of law in using the scaffold, or in permitting the board to topple over.
2. ———: ———: **Contributory Negligence.** An employee injured while using an appliance furnished by the master cannot be held guilty of contributory negligence as a matter of law in using the appliance, unless the danger therefrom was so glaring and obvious as to deter a reasonably prudent man from using it.
3. ———: ———: **Assumption of Risk.** An employee does not assume a risk created by the employer's negligence.
4. **TRIAL PRACTICE: Conflicting Evidence: Questions for Jury.** Where the evidence is conflicting, the question is for the jury.
5. **MASTER AND SERVANT: Injury to Servant: Instructions: Submitting Unnecessary Facts.** In an action by an employee for injuries sustained in jumping from a scaffold formed by a narrow plank laid across two stepladders, when a heavy board which he was holding in position toppled over and was about to fall upon him, an instruction given for plaintiff, which required the jury to find that the scaffold, as constructed, was too narrow and was unstable and insecure and that there was insufficient room thereon for plaintiff to work and move about, and by reason thereof his footing was rendered insecure and he was prevented from so bracing himself as to enable him to hold the board in place and prevent it from becoming overbalanced and falling, and that the "scaffold was so narrow that if said board did fall, there was no room thereon for plaintiff to get out of the way," was not objectionable, because of the quoted

words, on the ground that defendant could not have anticipated that the board would fall and, therefore, was not required to furnish a scaffold wide enough to allow plaintiff to step back far enough to avoid injury, since liability was not predicated upon any such duty and the instruction merely required a finding on those facts conjunctively with a finding on the theory upon which liability was predicated.

6. **INSTRUCTIONS: Submitting Unnecessary Facts: Harmless Error.** An instruction will not be condemned as reversible error for submitting unnecessary facts, where the facts upon which liability is predicated are correctly submitted and the only effect of submitting the other facts is merely to require the jury to find more than is necessary to warrant a recovery.
7. **———: Credibility of Witnesses.** While there must be something to afford a reasonable basis therefor, to justify the giving of a cautionary instruction, that if the jury believe that any witness has knowingly sworn falsely to any fact material to the issues, they are at liberty to reject all, or any portion, of his testimony, nevertheless where there is a direct and sharp conflict in the testimony as to the material facts, which cannot reasonably be attributed to mistake, inadvertence or lapse of memory, the giving of such an instruction will not be denounced as an abuse of discretion.
8. **DAMAGES: Personal Injuries: Excessiveness of Verdict.** Plaintiff, a man twenty-three years of age, strong and vigorous, was injured in such a way as to necessitate the removal of a bone from the instep of his left foot and the ligaments attached thereto, as a result of which the foot will not only remain weak, but plaintiff will be unable to control it and it will more or less flop as he steps, so that he will be a cripple for life. *Held*, that a verdict for \$5000 was not excessive.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones*, Judge.

AFFIRMED.

H. A. & C. R. Hamilton and *T. E. Francis* for appellant.

(1) There was no evidence of negligence on the part of defendant and the court should have so instructed the jury. *Mathis v. Kansas City Stock Yards Co.*, 185 Mo. 434. (2) The plaintiff assumed the risk

of the inside section of said lintel falling and the master could not guard against the same, and was not required so to do. (3) The court instructed the jury if they found from the evidence that the scaffold upon which plaintiff was working was so narrow that if the lintel which he was building fell, there was not room on the scaffold to get out of its way, then they should find for plaintiff. The master was not required to anticipate the falling of said lintel and provide a platform of such width as to enable plaintiff to get out of the way of said falling lintel. (4) The second instruction given by the court at its own instance was unwarranted and erroneous. *White v. Maxey*, 64 Mo. 552; *State v. Hickam*, 95 Mo. 322; *Berry v. Railroad*, 124 Mo. 223; *Keeline v. Sealy*, 257 Mo. 527; *Lloyd v. Meservey*, 129 Mo. App. 636. (5) The verdict is excessive.

John A. Blevins and *J. W. Jamison* for respondent.

(1) Defendant was negligent in furnishing plaintiff with a scaffold not reasonably safe upon which to do the work required of him. *Combs v. Rountree Const. Co.*, 205 Mo. 367; *Raines v. Lumber Co.*, 149 Mo. App. 576; *Bowen v. Railroad*, 95 Mo. 277; *Broomfield v. Worcester Const. Co.*, 118 Mo. App. 257; *Houston v. Railroad*, 129 Mo. App. 576. A servant cannot assume to bear the consequences of the master's negligence. *Curtis v. McNair*, 173 Mo. 270. The servant does not assume extraordinary risk, or such as are occasioned by the carelessness or negligence of the master. *Brady v. Railroad*, 206 Mo. 509. The doctrine does not apply where the injury was occasioned by the negligence of defendant. *Tinkle v. Railroad*, 212 Mo. 445; *Patrum v. Railroad*, 259 Mo. 121; *Fish v. Railroad*, 172 S. W. 346. (2) The mere fact that plaintiff assisted in putting up the scaffold under the direction of defendant's

foreman would not lessen the responsibility of defendant in the matter. *Combs v. Rountree Const. Co.*, supra. As a matter of fact, the specifications of negligence set forth in plaintiff's petition, and the evidence in support thereof, were sufficient to make out a case of statutory negligence against appellant under Sec. 7843, R. S. 1909. (3) The court, in the exercise of its discretion, gave instruction number 2, of its own motion; the evidence in the case warranted the giving of such instruction. *Miller v. Madison Car Co.*, 130 Mo. 525; *Hartpence v. Rogers*, 143 Mo. 634. (4) The questions of the assumption of risk and contributory negligence were properly submitted to the jury and their finding in favor of the plaintiff on these issues is conclusive. *Brady v. Railroad*, 205 Mo. 509; *Dakan v. Chase, Son & Co.*, 197 Mo. 266; *George v. Railroad*, 225 Mo. 406.

ALLEN, J.—This is an action for personal injuries sustained by plaintiff while in the employ of defendant corporation and alleged to have been caused by its negligence. There was a verdict and judgment below for plaintiff, and the case is here upon defendant's appeal.

Defendant is a construction company, and on November 17, 1911, was engaged in erecting a public school building in the city of St. Louis, upon which plaintiff was employed as a carpenter. On the date last mentioned plaintiff was injured while working upon the second floor of the building then in process of construction. It appears that plaintiff and a fellow workman, named Bliven, were engaged in constructing a wooden frame across the top of a window opening in one of the walls of the building, into which frame, when completed, was to be put cement, with metal strips or rods extending through the same, in order to form a lintel of reinforced concrete above this window. The brick wall had been erected to the top of the window

opening, and the lintel was to rest upon the wall with its ends embedded therein. The floor of the second story had been laid, and was of concrete; and plaintiff and his fellow workman were upon this floor engaged in putting in place the lintel frame above mentioned.

It appears that the latter was put up in three sections, as they are termed, consisting of the bottom, the outer section and the inner section. The first two of these had been put in place, and plaintiff and Bliven were putting up the inner section when plaintiff was injured.

Plaintiff's evidence goes to show that this inner section of the lintel frame consisted of four planks fastened together, the whole being from thirty-seven to forty inches in width and about twelve feet long, the lumber used being two inches in thickness. It had been previously used for similar purposes, and plaintiff testified that it had been lying upon the ground in a pool of water formed by rainfall, was water-soaked, and weighed at the time from two hundred to two hundred and fifty pounds. Defendant's testimony is that it was about twenty-nine inches in width, and did not weigh more than one hundred and fifty pounds. In putting the section in place plaintiff and Bliven used a scaffold about ten feet in height formed by placing a plank across the top of two stepladders. It is said that this plank was ten inches wide, two inches in thickness, and about twelve feet long, and that the stepladders were made of light material. It appears that plaintiff and Bliven stood upon this plank while four other men, one of them being defendant's superintendent, passed up to them this section; that they then put it in place along the window opening, resting it upon certain cross-arms that had been prepared to receive it. In this position it formed one of the vertical sides of the trough-like frame for making the lintel. It was not nailed in place. Plaintiff's testimony is to the effect that he had orders not to nail it, but certain braces

were to be put in, and it is said that wires were to be put through the frame to keep the sides from expanding when the concrete was put into it.

The testimony in plaintiff's behalf is that after the section had been thus put in place, Bliven descended from the scaffold in order to get the braces above-mentioned which had been left upon the floor below because of lack of room therefor on the scaffold, leaving plaintiff standing about the middle of the scaffold holding the inner section of the lintel frame in place by leaning his shoulder against it. He was not supporting its weight, for, as said above, it rested on cross-arms, and all that was necessary was to keep it from tipping over. He testified that, as he thus stood, the upper edge of this section was about four inches above his shoulder; and that while he was thus holding it in place the section for some reason began to topple over toward him, and that owing to the narrowness of the plank upon which he was standing and the insecurity of the scaffold he was unable to exert sufficient pressure against it to hold it upright, and that in order to avoid being pushed from the scaffold by the falling section he jumped therefrom to the floor below, whereby he sustained the injuries for which he sues.

The testimony for plaintiff goes to show that defendant's superintendent ordered plaintiff to construct the temporary scaffold upon which he was working, in the precise manner in which it was constructed; that plaintiff was directed to take one of the "two by ten" boards which were at hand, and place it across the two stepladders. And plaintiff testified that two or three weeks prior to the day of his injury, the superintendent had ordered him not to thereafter make and use for this work scaffolds formed with a number of bricklayers' trestles and boards, such as plaintiff had been theretofore using, for the reason that this took too much time and was too expensive, but instead to

place a plank across two stepladders, and that plaintiff had protested against this.

Plaintiff did not undertake to say what caused the section of the lintel frame to topple over. There is testimony, however, to the effect that there was "quite a little wind blowing" into the window opening and against the section which plaintiff was attempting to keep in place. Plaintiff says that the section suddenly began to press against his shoulder; that he could not move his feet back to brace himself, and could exert only slight pressure against the upright section of the lintel frame for the reason that the reaction tended to push the light scaffold from beneath his feet; and finding that he was about to be pushed from the plank upon which he was standing he jumped to the floor, calling out a warning to the workman below.

It is unnecessary to notice the pleadings. The theory upon which plaintiff's case proceeds readily appears from the foregoing statement of the evidence adduced in support thereof.

1. It is urged that the trial court should have peremptorily directed a verdict for defendant; but we think it quite clear that the case made by plaintiff was one for the jury. A prima-facie showing of negligence on the part of defendant, in respect to furnishing plaintiff a reasonably safe place to work, appears from plaintiff's testimony, corroborated in certain particulars by other testimony, tending to show that the scaffold upon which he was working was not reasonably safe for the work in which he was engaged; that it was constructed pursuant to the explicit orders and direction of defendant's superintendent, and that the latter had ordered plaintiff, over his protest, not to make and use scaffolding such as he had used on other like work because it took too much time to construct the same. Defendant's evidence tends to show the

contrary; that the superintendent gave no such orders or directions, and that plaintiff and his fellow workman selected their own material and constructed a scaffold of their own choosing. But the issue thus raised was one for the jury.

Under the circumstances, if the scaffold, formed by a narrow plank laid across two stepladders, by reason of the narrowness and insecurity thereof did not furnish a reasonably safe place for plaintiff to perform the work assigned to him in putting up the section of the frame in question, and plaintiff's injuries are fairly and reasonably attributable thereto, the defendant is liable as for a breach of its duty to furnish a reasonably safe place to work, unless it can be said that plaintiff was guilty of contributory negligence in so using this scaffold. It is quite clear, however, that plaintiff cannot be held to have been guilty of negligence as a matter of law, in using the scaffold, for it does not appear that the danger therefrom was so glaring and obvious as to deter a reasonably prudent man from following the master's directions. Nor can plaintiff be convicted of negligence, as a matter of law, under the evidence adduced, for permitting the section of the lintel frame to topple over. The question of plaintiff's contributory negligence was a matter for the consideration of the jury.

And if the danger was one created by the master's negligence, it was not a risk assumed by the servant. This matter has been so frequently passed upon by our courts as to make it unnecessary to dwell upon it. [See *Patrum v. Railroad*, 259 Mo. 109, 168 S. W. 622; *Crader v. Railroad*, 181 Mo. App. 1. c. 537, 164 S. W. 678.]

II. Plaintiff's main instruction is complained of. The instruction is lengthy and need not be here reproduced. It requires the jury to find that the scaffold as constructed "was too narrow and was unstable and

insecure, and that there was insufficient room on same for plaintiff to work and move about, as was necessarily required in the course of the work in which he was engaged, and that by reason of the conditions aforesaid plaintiff's footing on said scaffold was rendered insecure and that plaintiff was thereby prevented from so placing and bracing himself as to enable him to exert the necessary force to hold said section of lintel in place and prevent it from becoming overbalanced and falling, *and that said scaffold was so narrow that if said lintel did fall there was not room thereon for the plaintiff to get out of the way.*"

Appellant assails this instruction on the ground that the words italicized above authorize a recovery if the jury find that the section of the lintel frame fell and that there was insufficient room upon the scaffold for plaintiff to get out of the way of the same. And it is argued that defendant could not have anticipated that the section of the lintel frame would topple over, and was not required to furnish a scaffold wide enough to allow plaintiff to step far enough back to avoid injury thereby.

But liability was not predicated upon any such duty on the part of the defendant. The instruction requires the jury to find all of the facts essential to a recovery under the theory upon which the case proceeds. Conjunctively it requires the jury to find that the scaffold was not wide enough to permit plaintiff to move thereupon out of the way of the falling section of the frame. Had it been of sufficient width therefor, though unstable and insecure, plaintiff might not have been justified in jumping to the concrete floor by reason whereof he was injured.

In any event, in view of the fact that the instruction otherwise fully and well covers the case, the adding of these words thereto could not constitute reversible error.

III. The court of its own motion gave an instruction on the credibility of witnesses and the weight to be given to their testimony. This instruction is in the usual form and concludes by telling the jury that if they believe that any witness had knowingly sworn falsely to any fact or facts material to the issues in the case, they are at liberty to reject all or any portion of the testimony of such witness.

Error is assigned to the giving of this instruction, upon the ground that there was nothing to indicate that any witness had willfully or intentionally sworn falsely and that it was therefore an abuse of discretion to suggest to the jury that they might disregard all of the testimony of any witness.

While the matter is one resting to a great extent in the discretion of the trial court, it is true that there must be something to afford a reasonable basis therefor in order to justify the court in giving such an instruction. [See *Keeline v. Sealy*, 257 Mo. 498, 165 S. W. 1088.] But where, as here, there is a direct and sharp conflict in the testimony as to material facts, which cannot reasonably be attributed to mistake, inadvertence or lapse of memory, the giving of an instruction of this character could not well be denounced as an abuse of the discretion of the trial judge, who had the witnesses before him and saw their conduct and demeanor upon the stand. The testimony in the record before us is highly conflicting on the most important issue in the case, viz., whether plaintiff was using a scaffold constructed pursuant to the orders and directions of defendant's superintendent or one entirely of his own choosing. Nor is this the only direct conflict in the testimony. It was therefore not reversible error to give this instruction. [See *Schuler v. Insurance Co.*, 191 Mo. App. 52, — S. W. —; *Hartpence v. Rogers*, 143 Mo. l. c. 634, 45 S. W. 650.]

IV. Appellant suggests that the verdict which was for \$5000, is excessive. Prior to his injuries plaintiff was evidently a strong, vigorous young man. He was twenty-three years of age when injured. It is unnecessary to review in detail the evidence touching his loss. As a result of his injuries he has become crippled for life. The evidence shows that it became necessary to remove a bone from the instep of the left foot; and the ligaments attached thereto, in the language of the surgeon who performed the operation, "had to be sacrificed." Three physicians testified in the case, and their testimony leaves no room for doubt as to the permanency of the injuries. It appears that the foot will not only remain weak, but that plaintiff will be unable to control it, and that it will "more or less flop" as he steps, because of the fact that certain ligaments are gone.

Under the evidence there is nothing to call for interference by this court because of the extent of the recovery.

We perceive no reversible error in the record, and the judgment should therefore be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

FRANK C. O'MALLEY, Administrator, Respondent,
v. JOHN U. MUSICK, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **FRAUD AND DECEIT:** Sufficiency of Evidence. In an action for fraud in inducing plaintiff's intestate to exchange her land for nonexistent land, evidence *held* sufficient to support a verdict for plaintiff.
2. **RES ADJUDICATA:** Matters Concluded: Identity of Causes of Action: Adjudication not on Merits: Splitting Demands. Defendant represented to plaintiff's intestate that he was the

agent of the owner of certain land, which, as a matter of fact, was nonexistent, and entered into negotiations with her for an exchange of land belonging to her for the fictitious property. In the negotiations, defendant used a false plat, purporting to be a true copy from the records of the county in which the fictitious land was represented to be located, which bore a certificate by him, over his hand and seal as a notary public, to the effect that the plat was a correct copy of the original on record. A false abstract also was furnished plaintiff's intestate, appearing on its face to show perfect title in the putative owner of the fictitious land. Plaintiff's intestate made the exchange, the deed given to her appearing to have been acknowledged by the putative owner before defendant as a notary public. After discovering the fraud, plaintiff's intestate, as relator, instituted suit on the bond given by defendant as a notary public, on the theory that defendant had committed a breach of the bond, in and about said transaction. A recovery was denied relator for the reason that the action was barred by the special Statute of Limitations applicable to suits on bonds of notaries public (Sec. 10181, R. S. 1909). Subsequently, this action, for fraud on the part of defendant in inducing plaintiff's intestate to exchange her land for nonexistent land, was instituted. *Held*, that the judgment rendered in the action on the bond, is not a bar to the present action, for the reason that the two causes of action are not identical and no point adjudicated in the former action was presented for adjudication in the latter, and for the further reason that the judgment rendered in the former action was not an adjudication on the merits. *Held, further*, that the bringing of the two suits was not a splitting of the cause of action.

3. ———: ———: Adjudication not on Merits. A suit is not barred by a former judgment unless such adjudication was on the merits.
4. **STATUTE OF LIMITATIONS: Disabilities: Married Women.** The provisions of the Statute of Limitations, relating to the time for bringing an action for fraud, do not, under Sec. 1894, R. S. 1909, apply to married women; and, under Sec. 1896, the personal representative of a deceased married woman may bring such an action within one year after her death.
5. **FRAUD AND DECEIT: Instructions: Singling Out Facts.** In an action for fraud in inducing plaintiff's intestate to exchange her land for nonexistent land, by means of a plat, purporting to cover the nonexistent land, *held* that, in view of the fact that defendant's use of such plat was not a mere isolated circumstance in the case, but was the chief evidence to connect defendant with the fraud, an instruction requiring the jury to find that defendant exhibited the plat to the agent of plaintiff's

intestate and represented that the land was the land to be exchanged for hers, was not improper as directing the jury's attention to a particular fact in evidence and unduly emphasizing it.

6. **DAMAGES: Generality of Instructions: Walver.** Where the instruction on the measure of damages is correct in its general scope, it is the duty of defendant, if he deems the instruction too general, to request that a limiting instruction be given.
7. **FRAUD AND DECEIT: Parties: Real Party in Interest.** In an action for fraud in inducing plaintiff's intestate to exchange her land for nonexistent land, the fact that the intestate took the deed covering the nonexistent land in the name of her daughter was no ground for arresting a judgment for plaintiff, on the theory that plaintiff's intestate was not the real party in interest, since the intestate was the one defrauded of the property which she exchanged.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

AFFIRMED.

Frank H. Braden, George W. Lubke and George W. Lubke, Jr., for appellant.

Thomas D. Cannon and F. C. O'Malley for respondent.

(1) The plea of *res adjudicata* made by defendant here is not well taken. The case of State ex rel. Margaret O'Malley v. John U. Musick et al. (reported in 145 Mo. App. 33, and 165 Mo. App. 214) was an action upon the official bond of defendant Musick as a notary public. The three years' Statute of Limitations (Sec. 10, 181, R. S. 1909) was pleaded, and the following conclusion was reached by this court: "Our conclusion is that this action was, under the law, clearly barred by the Statute of Limitations (Sec. 10, 181, *supra*) at the time it was instituted. This conclusion results in the reversal of the judgment and it is so ordered." The merits of the case were not considered, and the trial

judge so held, and properly denied the defendant's plea of *res adjudicata*. The plea of *res adjudicata* must fail where there is no identity of the cause of action, or where the merits of the subject-matter of the former suit were not litigated. *Windham v. Kline*, 77 Mo. App. 37; *Perkins v. Goddin*, 111 Mo. App. 442; *Lincoln Trust Co. v. Nathan*, 122 Mo. App. 328; *Short v. Taylor*, 137 Mo. 517; *Couch v. Hart*, 210 Mo. 457. (2) There was no election of remedies in the case of *State ex rel. Margaret O'Malley v. John U. Musick et al.* Mrs. O'Malley did not have two remedies; the remedy she pursued against the notary and his bondsmen was barred by the Statute of Limitations when the suit was filed; the plaintiff in that case was mistaken in the remedy she pursued. She did not have two remedies in fact, and could not make a binding choice. There was only one existing remedy at the time, which she did not pursue, but which her administrator is now prosecuting here. *Johnson Brinkman Co. v. Railroad*, 126 Mo. 351; *Hartwig v. Insurance Co.*, 167 Mo. App. 130. (3) Instruction number 1 is not open to the objection made by appellant that it unduly comments or gives prominence to certain parts of the testimony. *Rollins v. Schawaker*, 153 Mo. App. 291; *Oehler v. German-American Ins. Co.*, 159 Mo. App. 695. Plaintiff is not to be condemned because he failed to request other instructions, for the law does not intend to compel a litigant to make such request unless he chooses to do so. *Sowders v. Railroad*, 127 Mo. App. 119. (4) Instruction number 2 upon the measure of damages is not open to the objection directed against it by the appellant. If the plaintiff's instruction on the measure of damages is general, and in nowise particularizes the damages, it devolves upon the defendant to ask an instruction limiting what might possibly be its effect upon the jury. *Pope v. Florea*, 167 Mo. App. 601; *Reeves v. Lutz*, 179 Mo. App. 86; *Morris v. Railroad*, 184 Mo. App. 106. (5) The petition charged and the

testimony showed that plaintiff's intestate desired to take the title to the Georgia land described in the name of Mary M. O'Malley for the benefit of herself, the intestate, and if the defendant had any objection to the allegations of the petition in that respect, it was his duty to raise the question by a proper pleading; the objection comes too late after verdict and cannot be raised by a motion in arrest. *Railroad v. Express Co.*, 145 Mo. App. 371, 375; *Handle v. Huffman*, 140 Mo. App. 642; *Bennett v. Railroad*, 151 Mo. App. 598; *Reifschneider v. Beck*, 148 Mo. App. 740; *Mirgus v. Bank of Ethel*, 136 Mo. App. 413; *Barnard v. Keathley*, 230 Mo. 222. The fact is that under the authorities in this State either the intestate or her daughter might bring suit for the fraud. *Ellis v. Harrison*, 104 Mo. 277.

ALLEN, J.—On and prior to May 12, 1900, Margaret O'Malley, a married woman, was the owner of certain real property in the city of St. Louis, and on the day mentioned she agreed with the defendant to exchange her said property for certain lands described as and purporting to lie in Montgomery county, Georgia. The defendant is a real estate agent, and it appears that the negotiations in question were begun by him with another real estate agent representing Mrs. O'Malley. The defendant represented himself as the agent of one Dunford, the putative owner of the Georgia lands, which was said to consist of "Lot 44 of the Thomas Cooper Grant of 77,000 acres, containing one thousand acres, as numbered on the surveyor's plat of the Cooper Grant" of Montgomery county, Georgia.

In point of fact the so-called Thomas Cooper Grant was one of certain early fraudulent land grants in the State of Georgia, which, shortly after the granting thereof, were by legislative enactment declared to be fraudulent and void. It appears that the county in question consists of only some 550,000 acres, whereas

these fraudulent land grants purported to grant to certain persons about 7,000,000 acres of land therein.

The evidence is that certain persons in the city of St. Louis, operating with others in Montgomery county, Georgia, dealt in these fictitious lands. Through pretended conveyances to Dunford, who lived in the city of St. Louis, a semblance of title to certain of these lands was made to appear as being in him; and it seems that prior to the occasion here in question he had executed various deeds purporting to convey portions of such lands, his acknowledgments to which deeds had been taken by the defendant as a notary public.

In the negotiations leading up to the exchange of Mrs. O'Malley's property, a false plat was used by defendant purporting to be a true and correct copy from the records of Montgomery county, which bore a certificate by him, over his hand and seal as a notary public, to the effect that the same was a correct copy of the original on record. Mrs. O'Malley's husband went to Montgomery county, Georgia, and was shown land purporting to be the land to be exchanged. A false abstract was furnished Mrs. O'Malley's representatives, appearing upon its face to show perfect title in Dunford to the land in question. She thereupon executed and delivered a deed to her property in exchange for Dunford's deed to the fictitious Georgia lands; the latter deed, wherein Dunford was described as being of Montgomery county, Georgia, appearing to have been acknowledged by him before defendant as a notary public.

On January 12, 1906, Mrs. O'Malley, as relator, brought suit in the circuit court of the city of St. Louis against this defendant and the sureties upon his bond as notary public, upon the theory that defendant had committed a breach of the bond in and about the transaction aforesaid. The trial of said cause in the circuit court resulted in a judgment against defendant

and his said sureties for the penalty of the bond, to-wit, \$5000. After having been appealed to this court the cause was transferred to the Springfield Court of Appeals and there disposed of in an opinion by Nixon, J., of that court. [See State ex rel. v. Musick, 145 Mo. App. 33, 130 S. W. 398.] Subsequently the Supreme Court declared unconstitutional and void the legislative Act under which such transfer to the Springfield Court of Appeals had been made; by reason whereof the case was retransferred to this court, where the jurisdiction of the appeal continued to reside. In finally disposing of it, this court adopted the opinion of the Springfield Court of Appeals cited above, and reversed the judgment. [See State ex rel. v. Musick, 165 Mo. App. 214, 145 S. W. 1184.] A reference to that opinion will disclose that it was held that the action was barred by the special Statute of Limitations applicable to suits upon bonds of notaries public (Sec. 10181, Rev. Stat. 1909), which had been invoked by the defendants.

On January 15, 1911, Mrs. O'Malley departed this life; and on January 5, 1912, her administrator, the plaintiff herein, instituted this action which proceeds against the defendant as for fraud and deceit in procuring the exchange of Mrs. O'Malley's St. Louis property for the fictitious Georgia lands. The trial below before the court and a jury resulted in a verdict and judgment for plaintiff in the sum of \$6000, and the case is here on defendant's appeal.

It is unnecessary to notice the pleadings, or to review the testimony adduced to support the allegations of fraud charged in the petition. Appellant does not challenge the action of the trial court in overruling its demurrer to the evidence. Though he claims to have been innocent of the fraud, and to have been interested only to the extent of his commissions as a real estate broker, there is ample evidence to support the verdict against him.

The points urged for a reversal may be briefly disposed of. The contention that the judgment in the former case concludes the rights of the parties in this is clearly without merit. The former action was, as said, one for a breach of the obligation of defendant's bond as a notary public, and proceeded against the defendant and his sureties. It was held on appeal that the particular cause of action sued upon was barred by the special Statute of Limitations, *supra*, the relator's disability by reason of being a married woman not preventing the running of the statute. The reasons for this ruling will fully appear by reference to the opinion of NIXON, J., adopted by this court. [State ex rel. v. Musick, 145 Mo. App. 33, 130 S. W. 398.] The instant suit is not upon the identical cause of action involved in the former case, but is one sounding in tort, for the recovery of damages for the alleged false and fraudulent representation of defendant in the premises, and his alleged conspiracy with others to defraud plaintiff of her property. The present action is not governed by a special Statute of Limitations; and is not barred by the provisions of the Statutes of Limitation applicable to cases of this character, for the reason that Mrs. O'Malley was under the disability of coverture until her death and the cause was instituted within one year thereafter. [See Secs. 1894 and 1896, Rev. Stat. 1909.]

It is true that this petition, among other allegations of facts respecting the alleged fraud, avers that the defendant executed a false acknowledgment as notary public. This, however, is but one link in the chain of fraud alleged and which the evidence goes to establish. It does not make his cause of action identical with that involved in the prior suit against the defendant and his sureties for an alleged breach of defendant's bond as a notary.

Nor is there here any question as to the splitting of demands, as appellant contends. What would be the

situation if a recovery had been had in the former suit and a further recovery sought in such an action as this, is a matter with which we have no present concern. And there are other phases of the matter which need not be adverted to.

The entire argument respecting the effect of the former judgment may be disposed of by saying that in that action there was no adjudication on the merits. The fact that the action was barred by the special statute interposed prevented a determination of the cause on appeal upon its merits. And not having been disposed of on the merits, it could in no manner affect plaintiff's right to maintain the present suit. [See *Baldwin v. Davidson*, 139 Mo. 118, 40 S. W. 765; *Short v. Taylor*, 137 Mo. 517, 38 S. W. 952; *Johnson v. United Railways Co.*, 243 Mo. 278, 147 S. W. 1077; 23 Cyc., p. 113 *et seq.*] And it cannot be successfully contended that though the two causes of action are not identical nevertheless a point actually adjudicated in the former action concludes the parties thereafter as to the matter so adjudicated, as in *LaRue v. Kempf*, 186 Mo. App. 57, 171 S. W. 588, and cases of that character.

Appellant complains of an instruction given for plaintiff, on the ground that it is an unwarranted comment on the evidence, directing the attention of the jury to a particular fact in evidence and unduly emphasizing the same. This instruction is lengthy and it is unnecessary to here reproduce it. Among other things it requires the jury to find that the defendant exhibited to Mrs. O'Malley's agent the plat above referred to, and represented that lot forty-four marked thereupon was a correct description of the one thousand acres of land to be taken in exchange for Mrs. O'Malley's property. An examination of the instruction, in the light of the evidence adduced, convinces us that no reversible error was committed in giving the instruction in this form. The testimony for plaintiff as to the use made by defendant of this fraudulent plat, certified to

by him, was not a mere isolated circumstance in the case, but constituted the chief evidence to connect the defendant directly with these fraudulent land deals and to show that he was not acting as a mere agent in ignorance of the fraud. We therefore rule the point against appellant.

Complaint is made of the instruction on the measure of damages, because of the generality thereof. But there is clearly no merit in this contention. The instruction is well enough in its general scope; if the defendant deemed it too general it was his duty to ask a limiting instruction. [See *Browning v. Railroad*, 124 Mo. 55, 27 S. W. 644; *King v. City of St. Louis*, 250 Mo. 501, 157 S. W. 498; *State v. Reynolds*, 257 Mo. 19, 165 S. W. 729; *Nelson v. United Railways Co.*, 176 Mo. App. 423, 148 S. W. 446.]

It is said that the motion in arrest should have been sustained for the reason that Mrs. O'Malley, whose administrator now prosecutes this action, was not the real party in interest. This argument is based upon the fact that Mrs. O'Malley took the deed to the fictitious Georgia land in the name of her daughter. But this point is likewise without merit for the reason that it was Mrs. O'Malley who was defrauded of her property, and it is wholly immaterial to whom she may have desired to have the land deeded which she thought would be obtained in exchange for her property, but which was not in existence.

Other questions raised do not warrant discussion. The judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

GEORGE SCHMIDT et al., Respondents, v.
SUPREME COURT UNITED ORDER OF
FORESTERS, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **APPELLATE PRACTICE: Law of Case.** A decision by the Supreme Court is the law of the case and is binding on a Court of Appeals, on a subsequent appeal.
2. **FRATERNAL BENEFICIARY ASSOCIATIONS: Not Licensed to do Business When Policy Issues: Suicide as Defense: Statutes.** A provision in a policy issued to a citizen of this State by a fraternal beneficiary association organized under the laws of another State, that suicide shall be an absolute bar to any recovery thereon by his beneficiaries, will not defeat a recovery, where the company was not licensed to do business in this State at the time the policy was issued but was so licensed when the insured committed suicide; for, under such circumstances, the policy is governed by Sec. 6945, R. S. 1909, which provides that suicide shall be no defense, unless it be shown that insured contemplated suicide at the time he made his application for the policy, since Sec. 6962, exempting fraternal beneficiary associations from the provisions of the general statute (Sec. 6945) applies to such associations only as were "doing business in this State" at the time the policy was issued—that is, were licensed to do business in the State as the act authorizes and requires; following *Schmidt v. Foresters*, 228 Mo. 675.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

AFFIRMED.

Douglas W. Robert for appellant; *Robert & Robert* of counsel.

(1) The insured agreed that the laws of the order in force at the time of his death should determine the rights of the beneficiaries and the obligations between the order and its members and that his rights should be limited by the laws then in force or which might

afterwards be adopted. Such an agreement is valid, and an after-adopted suicide law is binding. *Westerman v. K. P.*, 196 Mo. 740; *Lewine v. K. P.*, 122 Mo. App. 557; *Pearson v. Indemnity Co.*, 114 Mo. App. 290; *Richmond v. Supreme Lodge*, 100 Mo. App. 8; *Morton v. Supreme Council*, 100 Mo. App. 94; *Morton v. Royal Tribe*, 93 Mo. App. 78; *Toomey v. Supreme Lodge*, 74 Mo. App. 517; *Niblack, Ben. Soc.* (2 Ed.), p. 274; 1 *Bacon, Ben. Soc.* (3 Ed.), sec. 188. (2) The application, the certificate and the by-laws of the respondent formed the contract. *Gallop v. Royal Neighbors*, 167 Mo. App. 85; *Richmond v. Supreme Lodge*, 100 Mo. App. 19; *Laker v. Royal Union*, 95 Mo. App. 353; *Slater v. K. & L. H.*, 76 Mo. App. 387; *Sheele v. Lodge*, 63 Mo. App. 277; *State ex rel. v. Benev. Soc.*, 42 Mo. App. 485-488; *Grand Lodge v. Sater*, 44 Mo. App. 452; *Mulroy v. K. of P.*, 28 Mo. App. 472; *Grand Lodge v. Elsner*, 26 Mo. App. 117. (3) No rights accrue in a fraternal beneficiary certificate until after the death of the member. *Lewine v. K. P.*, 122 Mo. App. 554; *Grand Lodge v. McFadden*, 114 Mo. App. 191; 213 Mo. 269; *Richmond v. Supreme Lodge*, 100 Mo. App. 8; *Morton v. Royal Tribe*, 93 Mo. App. 78; *Legion of Honor v. Niedlet*, 81 Mo. App. 598; *Toomey v. Supreme Lodge*, 74 Mo. App. 517; *Masonic Ben. Assn. v. Bunch*, 109 Mo. 579. (4) The agreement making the answers warranties is valid. If the answers are false it is a good defense, for the warranty must be literally true. *McDermott v. Woodmen*, 97 Mo. App. 636; *Van Cleve v. Casualty Co.*, 82 Mo. App. 688; *Ashford v. Insurance Co.*, 80 Mo. App. 638; *Aloe v. Insurance Co.*, 164 Mo. 675; *Aloe v. Insurance Co.*, 147 Mo. 571; *Whitmore v. K. & L. of H.*, 100 Mo. 36. (5) The pleadings fail to allege, and there is no proof, that Charles H. Fosz was a citizen of the State of Missouri at the time the certificate was issued to him. The motion in arrest of judgment should therefore have been sustained. Sec. 7890, R. S. 1899 (sec. 6937, R. S.

1909); Sec. 7896, R. S. 1899 (sec. 6945, R. S. 1909); Kroge v. Brotherhood, 126 Mo. App. 693.

W. F. Heideman for respondents.

(1) The fact that Fosz agreed that the laws of the order in force at the time of his death should determine the rights of his beneficiaries and the obligations between the order and himself, and that his rights should be limited by the laws then in force or which might afterwards be adopted, was considered and determined by this court at the first appeal of this case, and therefore, is *res adjudicata*. Schmidt v. United Order of Foresters, 228 Mo. 675; Keith v. Keith, 97 Mo. 223; Esler v. Railroad, 115 Mo. App. 574; Lawson v. Spencer, 90 Mo. App. 514; Ashby v. Gravel Road Co., 111 Mo. App. 79; Carey v. West, 165 Mo. 452. (2) (a) Under the pleadings the question of whether the insured was a citizen of Missouri was not in issue. Anderson v. Watts, 138 U. S. 694. (b) Appellant is bound by the case made in the circuit court. Ice & Cold Storage Co. v. Kuhlmann, 238 Mo. 701; Stonemets v. Head, 248 Mo. 243; State ex rel. v. Muench, 217 Mo. 124; Lucas v. Cella, 115 Mo. App. 395; Kilpatrick v. Wiley, 197 Mo. 123. (c) It was not necessary under the pleadings to offer evidence to prove that the insured was a citizen of Missouri; nevertheless, defendant itself offered evidence conclusively proving such fact. Kroge v. Modern B. of Am., 126 Mo. App. 693. (d) Sections 7890 and 7896 of the Revised Statutes of Missouri of 1899, are statutes of exemption, and must be specifically pleaded to be available to defendant (appellant). (3) Appellate courts will disregard such errors as produce no injury. Bragg v. Railroad, 192 Mo. 331; Cross v. Gould, 131 Mo. App. 585; Stumpe v. Kopp, 201 Mo. 412; Mann v. Doerr, 222 Mo. 1-15; Amelio v. Whitman, 127 Mo. App. 698;

Woody v. Railroad, 104 Mo. App. 678; Hanley v. Holton, 120 Mo. App. 393.

ALLEN, J.—This is an action to recover the proceeds of a certificate of insurance, to-wit, \$1000, and interest thereupon, issued to one Fosz, a citizen of this State, on December 1, 1911, by the defendant, chartered by the State of Wisconsin as a fraternal beneficiary association. The insured died by suicide on the 15th day of May, 1903.

At the time of the issuance of the certificate here sued upon defendant had not complied with the laws of this State as a fraternal association; but on January 6, 1902, it did comply with such laws, and thereafter, and until the death of the insured, was licensed to do and did do business in this State as such.

The application of the insured, and defendant's by-laws in force at the time, both of which are made a part of the contract of insurance, provide that such contract shall be void in case the insured shall take his own life. The insured also agreed in his application that the laws of the order in force on the day of his death should determine the rights of his beneficiaries; and that the application and all rights and privileges accruing to the insured or his beneficiaries thereunder, should be limited by and subject to the laws, rules and regulations of the defendant order then in force or which might thereafter be enacted or adopted by it.

This suit was instituted in the circuit court of the city of St. Louis on November 10, 1903. From a judgment for defendant plaintiff appealed to this court where the judgment was affirmed (see Schmidt v. Foresters, 124 Mo. App. 165, 101 S. W. 625), but the case was certified to the Supreme Court on the ground that the decision was in conflict with that of the Kansas City Court of Appeals in Huff v. Woodmen, 85 Mo. App. 96. The Supreme Court, however, held that this court was in error, reversed the judgment of the cir-

Schmidt v. United Order of Foresters.

cuit court and remanded the cause for a new trial. [See Schmidt v. Foresters, 228 Mo. 675, 129 S. W. 653.] The defendant then filed an amended answer in which it undertook to bring into the case certain constitutional questions. Another trial in the circuit court, proceeded with in accordance with the said opinion of the Supreme Court, resulted in a verdict and judgment for plaintiff, and defendant thereupon appealed to the Supreme Court; but that court declined to take jurisdiction of the appeal, for reasons that will appear by reference to its opinion in Schmidt v. Order of Foresters, 259 Mo. 491, 168 S. W. 626, and transferred the case here.

The defense, aside from a matter which need not be noticed, was that of suicide. As to this, plaintiffs have insisted that, since defendant had not complied with the laws of this State as a foreign fraternal beneficiary association at the date of the contract, its position in this State was that of an old-line insurance company, and that the contract was therefore controlled by what is now section 6945, Revised Statutes 1909, providing that suicide of an insured shall be no defense in an action on a policy of insurance unless it is shown that the insured contemplated suicide at the time of his application for the insurance, and declaring void any stipulation in the policy to the contrary; and that a subsequent compliance with our laws by defendant could not alter or affect the character of the contract in this respect. Defendant, on the other hand, has insisted that by complying with the laws of this State, as a foreign fraternal association, after the execution of the contract of insurance and prior to the death of the insured—who had agreed that the laws of the order in force at his death should determine the rights of his beneficiaries and that all rights under the contract should be subject to such laws of the order as might thereafter be enacted or adopted—defendant became entitled to the benefit of what is now section

6962, Revised Statutes 1909, exempting fraternal beneficiary associations from the operation of the suicide statute. (Sec. 6945, *supra*).

In its brief filed with us since this appeal has been transferred here, appellant says:

“We present but one question in this appeal, and that is whether or not Fosz and the Supreme Court of the United Order of Foresters could contract that the laws of the order in force at the time of the death of the appellant, shall determine the rights under the contract; and their right to contract that the contract shall be limited by, and subject to, all laws in force, or which may be afterwards enacted; and especially so when the order reserved the right and power to make changes in the existing laws, and said existing laws provide that all certificates shall be forever subject to said reserved right and power; and further with such a contract in existence did not the obtaining a license to do business in Missouri have the effect of reading the fraternal beneficiary law into the contract and changing it by giving full force and effect to the suicide by-law which was already in existence at that time.”

But the question which appellant asks us to review is one which had been entirely disposed of and foreclosed by the decision of the supreme court in this case. [Schmidt v. Forester, 228 Mo. 675, 129 S. W. 653.] The effect of the subsequent compliance with our law is there fully discussed, and the court *inter alia*, says:

“Nor is it unreasonable to say, as was said in the Jarman case, that the defendant in the case at bar cannot claim the benefits of an exemption provided by a law, until such time as it places itself in a position to claim the benefits of the law. It cannot claim the benefits of the law merely because its contracts are of the character mentioned in the law, but to claim the exemption given it must come in under the law, and

make its contract under the law. If it does that, then the law is read into and becomes a part of the contract, but until it does do that the general law is and must be read into each and every one of its contracts made with a citizen of Missouri. Not only so, but if such general law once becomes a material constituent part of the contract, it cannot be eliminated therefrom by the subsequent act of the defendant. And we are of opinion that the suicide statute is substantial law, and not merely a statute of procedure."

And again the court says: "When the association elects as to which contract it will make, as did defendant in this case, then that contract is fixed in character by the statutes which must be read into it at the time of the making, and not by statutes subsequently passed, or by statutes already passed but which are unavailing because of the fact that the association was not in position to write such contracts into the contract."

It is clear that the decision of the Supreme Court, *supra*, which is the law of this case, has altogether settled the question which we are now asked to pass upon. The contention appears to be that the Supreme Court has made no decision as to the effect of the stipulations aforesaid in the application for insurance, when considered in connection with defendant's by-laws. But the application and the by-laws were before that court, and its judgment settles all questions regarding the effect thereof upon the right of defendant to maintain the defense of suicide in this case. Furthermore, if, as the Supreme Court holds, our suicide statute was read into and became an integral part of this contract when made, and could not thereafter be eliminated by any act of the defendant, it matters not what agreements the insured may have made in his application in any way pertaining to the defense of suicide. His express agreement to the effect that suicide should forfeit the insurance was void. And any agreement on his part regarding the future rights of

his beneficiaries under the contract was equally ineffective, in so far as it pertained to a forfeiture of the insurance because of the suicide of the insured.

It follows that the judgment should be affirmed, and it is so ordered. *Nortoni, J.*, concurs; *Reynolds, P. J.*, following the decisions of our Supreme Court, as noted in the opinion, feels bound to concur in the result, doing so, however, without departing from what he has said in dissent in *Orderheide v. Modern Brotherhood of America*, 158 Mo. App. 677, 139 S. W. 269, a case now pending and under submission in the Supreme Court.

GEORGE E. YOST, Respondent, v. ATLAS PORTLAND CEMENT COMPANY, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work: Questions for Jury.** In an action by an employee for injuries sustained while employed as a shift foreman in charge of defendant's cement plant, by falling through a manhole into a coal bin, brought on the ground of negligence in not providing sufficient lights in and about that part of the plant, *held*, under the evidence, that the questions of negligence and contributory negligence were for the jury.
2. ———: ———: ———: **Insufficient Light.** The duty to furnish light—that is, to exercise ordinary care to see that a place of work is so lighted at night as to make it a reasonably safe place for an employee to pass over in the performance of his duty—is a continuing duty resting upon the master, for the breach of which, proximately resulting in injury to the employee, in the exercise of ordinary care for his own safety, the master is liable.
3. **TRIAL PRACTICE: Demurrer to Evidence: Rules of Decision.** In passing upon a demurrer to the evidence, the evidence must be viewed in the light most favorable to plaintiff, giving him the benefit of any inference favorable to him which may be fairly and reasonably drawn therefrom; and if the evidence is reasonably susceptible of two inferences, one lawfully support-

ing a right of recovery and the other fatal to plaintiff's case, leaving room for reasonable men to differ with respect thereto, the case is for the jury.

4. **MASTER AND SERVANT: Injury to Servant: Assumption of Risk.** Where a master is negligent in failing to exercise ordinary care to perform the continuing duty to furnish an employee with a reasonably safe place in which to work, the danger arising therefrom is not a risk assumed by the employee.
5. **NEGLIGENCE: Pleading: Specific Negligence: Proof of one Negligent Act Sufficient.** Where specific acts of negligence are pleaded, plaintiff must recover, if at all, upon one or more of such negligent acts constituting a cause of action; but he need not prove every negligent act charged, and it is sufficient if, keeping within his petition, he prove actionable negligence.
6. **MASTER AND SERVANT: Injury to Servant: Instructions: Assumption of Facts.** In an action by an employee for injuries sustained while employed as a shift foreman in charge of defendant's cement plant, by falling through a manhole into a coal bin, brought on the ground of negligence in not providing sufficient lights in and about that part of the plant, *held* that an instruction submitting plaintiff's theory of defendant's negligence, which did not require the jury to find that there was any negligence on the part of defendant in leaving the manhole open, but did require a finding that it was in fact open and that defendant had negligently failed to cause the premises in question to be so lighted as to enable plaintiff to discover such opening "in the ordinarily careful performance of his duties, and that plaintiff, by reason of said negligence and want of care, if any, on the part of defendant, and as the result thereof, and without fault on his part, fell into said coal tank," whereby he was injured, was not objectionable as assuming some negligence on defendant's part with respect to such manhole.

Appeal from Ralls Circuit Court.—*Hon. William T. Ragland*, Judge.

AFFIRMED.

Geo. A. Mahan, Albert R. Smith and Dulany Mahan for appellant.

(1) Plaintiff was vice-principal of the defendant and was injured by his own carelessness and by serv-

ants who were his subordinates. He has no cause of action against the defendant, and defendant's demurrer should have been sustained. *McGrory v. Railroad*, 118 S. W. 710, 23 L. R. A. (N. S.) 301; *Linemueller v. Arthur*, 53 So. 500, 127 La. 500; *Langdon-Creasy Co. v. Rouse*, 72 S. W. 1113; *Evans v. Railroad*, 62 Mo. 49; *Minster v. Citizens' Ry. Co.*, 53 Mo. App. 280; *Cole v. Jones*, 159 Mo. App. 473; *Seaman v. Koehler*, 122 N. Y. 646; *Zumalt v. Railroad*, 175 Mo. 311. (2) Defendant was not guilty of negligence. The plaintiff had full knowledge of the conditions. The evidence shows that the lid was properly constructed and the electric lights in proper condition except when they grew dim by burning, which plaintiff had a right to remedy. He assumed all the risk incident to his employment and cannot recover. *Woelflen v. Lewiston & Clarkson Co.*, 95 Pac. 493, 49 Wash. 405; *French v. Railroad*, 24 Wash. 83, 63 Pac. 1108; *Langdon-Creasy Co. v. Rouse*, 72 S. W. 1113; *Steeple v. Box Co.*, 33 Wash. 344, 74 Pac. 476; *Bradley v. Forbes Tea & Coffee Co.*, 213 Mo. 320; *Harper v. Green*, 168 Mo. 312; *Galaczi v. Construction Co.*, 124 Mo. App. 709; *Lee v. Railroad*, 113 Mo. App. 388; *Charlton v. Railroad*, 200 Mo. 433; *Smith v. Packing Co.* 111 Mo. App. 13; *Gummerson v. Kansas City Bolt & Nut Co.* 171 S. W. 959; *Braden v. Railroad*, 161 S. W. 279. (3) Under any consideration of the case the record shows that plaintiff was guilty of negligence which contributed directly to his own injury. *Smelser v. Railroad*, 170 S. W. 1124; *Sissel v. Railroad*, 214 Mo. 529; *Modlagl v. Iron & Foundry Co.*, 248 Mo. 587, 599; *Miller v. Railroad*, 175 Mo. App. 349, 351; *Jones v. Morgan Bros. (Wash.)*, 88 Pac. 626; *Bailey v. Stix, Baer & Fuller Dry Goods Co.*, 149 Mo. App. 656; *Piepho v. Merchants Loan and Trust Co.*, 168 Ill. App. 511; *Burnett v. Worcester Brewing Corporation, Mass.*, 106 N. E. 597; *Seyford v. Southern Pac. Co.*, 159 App. Div. (N. Y.), 870. (4) The court committed error in giving plaintiff's instruction num-

ber 1. (a) Because when specific acts of negligence are charged in the petition it is essential that the instruction submitting the issue to the jury shall require a finding of the facts of the negligence so charged. *May v. City of Hannibal*, 172 S. W. 471; *Chitty v. Railroad* 148 Mo. 64; *Beaver v. St. Louis Transit Co.*, 212 Mo. 331; *Allen v. St. Louis Transit Co.*, 183 Mo. 411. (b) Because it is a well-settled doctrine that where specific acts of negligence are charged in a petition plaintiff can recover only upon proof of the specified negligence. *Crone v. Oil Co.*, 176 Mo. App. 344; *McGrath v. Transit Co.*, 197 Mo. 97; *Israel v. United Railway Co.*, 172 Mo. App. 656; *Roscoe v. Metropolitan Street Railway Co.*, 202 Mo. 576. (c) Because it is error to assume the negligence pleaded in the petition, for plaintiff having asserted the facts concerning the negligence laid must be held to prove them. *May v. City of Hannibal*, 172 S. W. 471; *Orcutt v. Century Building Co.*, 201 Mo. 331; *Miller v. United Railway*, 155 Mo. App. 134.

J. L. Burns, W. A. Dudley and Jack Briscoe for respondent.

(1) Plaintiff was a foreman having specific duties to perform. The system of lighting defendant's plant was provided by defendant and beyond plaintiff's control. A foreman executing specific limited powers is as much entitled to a safe place to work as any other servant. *Combs v. Construction Co.*, 205 Mo. 367, top page 379; *Morton v. Barr Dry Goods Co.*, 126 Mo. App. 377, l. c. 385, and cases there cited; *English v. Shoe Co.*, 145 Mo. App. 439, 451. (2) Plaintiff was not injured by his own negligence, nor does a servant in any case assume the risk arising from the negligence of the master. *Erwin v. Telephone Co.*, 173 Mo. App. 508, 535, and cases cited thereunder; *Carleton v. Railroad*, 200 Mo. 413, 433; *Bible v. Railroad Co.*, 169

Mo. App. 519, 532; Curtis v. McNair, 173 Mo. 270; George v. Railroad Co. 225 Mo., 364, 407; Blanton v. Dold, 109 Mo. 64; Settle v. Railroad Co., 127 Mo. 336; Bradley v. Coal Co., 167 Mo. App. 177. Nor does the fact that the box-tender opened the trapdoor and left it open constitute any defense. They were put there to be opened under the circumstances of this case and even supposing that he was negligent in leaving it open, if the absence of proper light as the jury found, was the cause of the injury, the plaintiff should still recover. The negligence of a fellow servant must be the sole cause of the injury to constitute a defense. Deweese v. Mining Co., 54 Mo. 476; Johnson v. Bolt & Nut Co., 172 Mo. App. 214; Johnson v. Construction Co., 173 S. W., 1085; Irmer v. Brewing Co., 69 Mo. App. 17; Steffon v. Mayer, 96 Mo. 424; Thompson on Negligence, page 981. (3) The defendant was guilty of negligence in placing only eight or nine small electric lights to light up this vast platform, as long as a city block, with sixty-four manholes in it to be passed over from time to time by its servants. These manholes, or trapdoors, were put there to be opened from time to time. There had been previously sixteen or seventeen lights on the same space, eight of which had been removed. Irmer v. St. Louis Brewing Co., 69 Mo. App. 17; Mertz v. Lesdun & Sons Rope Co., 174 Mo. App. 109; Carney v. Brewing Assn., 150 Mo. App. 437, 444; Strobel v. Manufacturing Co., 148 Mo. App. 22, 33; Glazer v. Rothchild, 221 Mo. 180; Young v. Shickle H. & H. Co., 103 Mo. 324. That being the case, the questions of negligence and contributory negligence were for the jury to determine under the directions of the court. Reisert v. Williams, 51 Mo. App. 13; Holman v. Iron Co., 152 Mo. App., 672; Huhn v. Railroad Co., 92 Mo. 450; Powers v. Transit Co., 202 Mo. 267, 280, and cases cited thereunder; Carney v. Brewing Assn., 150 Mo. 437. (4) Appellant's point 4 is not well taken for several reasons: First, A plaintiff

is not obliged to rely on all the specifications of negligence contained in his petition or proven by the evidence, and it was competent, usual and proper to ask an instruction on the specification of insufficient light and not on the others. Second, the instruction number 1, given for plaintiff does not assume that the trapdoor or opening in the tank was negligently left uncovered. It would seem from the testimony that under the circumstances it was proper to remove the cover; but, however that may be, the jury were not called upon to find anything regarding the tank except that it was uncovered at the time of the injury and that the defendant had negligently failed to cause the premises in the vicinity of said platform to be so lighted that the plaintiff would have discovered said opening in said platform in the ordinarily careful performance of his duties. Third, The instruction predicates our right to recover upon one of the specific grounds set up in the petition. No general allegation of negligence is relied on at all, but, defendant is entirely wrong in asserting that we were obliged to submit to the jury all the grounds specified in the petition. Fourth, The defendant is wrong again in stating that the instruction assumes that plaintiff was in the exercise of ordinary care. It assumes nothing of the kind. It requires the jury to find as a fact, precedent to a right to recover, that the defendant had negligently failed to cause the premises to be lighted so that plaintiff in the ordinarily careful performance of his duty would have seen the opening. This was sufficient. But the instruction goes further and requires the jury to find that he was without fault. The court also in instruction number 2, defined negligence and ordinary care, so that the jury could not have gone wrong.

ALLEN, J.—This is an action for injuries sustained by plaintiff while in defendant's employ and

alleged to have been caused by defendant's negligence. There was a verdict and judgment below for plaintiff in the sum of \$1000, and the case is here on defendant's appeal.

At the time of plaintiff's injury he was employed by the defendant corporation in the capacity of "shift foreman," in charge of a cement plant in Ralls county, Missouri. He was injured on the night of October 12, 1911, while in the discharge of his duties as foreman, by falling into an open manhole on the premises.

It appears that there were sixteen kilns on the first floor of this plant and above each kiln was a cylindrical coal bin about fifteen feet in diameter. The tops of these bins were level with and formed a part of a platform or floor, about twenty feet above the kiln floor, extending the length of the building, a distance of about three hundred and sixty feet. It appears that the coal was finely pulverized and was conveyed into each of these bins by means of a conveyor, and passed out through a funnel-shaped exit at the bottom thereof. A "conveyor box," about twenty-eight inches square, was situated above each bin. This platform was lighted by eight incandescent electric light bulbs, each of sixteen candle power; and ordinarily there was another such light at the head of the stairway leading up from the kiln floor. The coal bins were numbered from one to sixteen, beginning at one end of the platform, and an electric light bulb was suspended above the conveyor box, over each alternate bin beginning with bin number 2. There was no such light over bin number 1, into which plaintiff fell, but the light at the head of the stairway was near this bin, and was upon an extension cord, or insulated wire, and could be moved some distance.

It appears that there were four openings or manholes in each of these bins, two on each side of the conveyor box, the covers thereof forming a part of the platform. It is said that the pulverized coal would

sometimes stick to the sides of the bins making it necessary to open one or more of the manholes and push it down with a long stick or a longhandled shovel.

On the night in question, at about one o'clock, plaintiff discovered that the coal was not feeding properly into kiln number 1, and ascended the stairway above mentioned, in order to see what was the trouble with coal bin number 1, situated directly above this kiln. A workman, termed the "box tender," was upon the platform above this bin pushing down the coal from the sides thereof, working through what is spoken of in the testimony as the second manhole of the two situated at one side of the conveyor box; the other, or first manhole, being eighteen or twenty inches from this hole in which he was working. He had taken the electric light hanging at the head of the stairs, and had put it down into the bin, and had removed the covers from both manholes. Upon reaching the platform plaintiff saw that this man was raking down the coal, having taken the electric light for this purpose, and undertook to walk across the platform to the second manhole. He did not perceive that the cover had been removed from the first manhole, in his path, and fell into the open hole and was injured.

Plaintiff testified that it was so dark at this place that he was unable to see that the hole into which he fell was uncovered. The evidence is that the electric bulb suspended above the conveyor box on bin number 2, some distance away, cast but a feeble light upon bin number 1, and that the conveyor box, over which this hung, cast a shadow over the greater part of the uncovered hole into which plaintiff fell. It also appears that the glare from the burners on the kiln floor was very great, and that when one passed from that floor to the platform above it was more than ordinarily difficult to see with insufficient light.

It appears that both of these manholes, eighteen or twenty inches apart, opened into the same com

partment; but the testimony in plaintiff's behalf is to the effect that when an electric globe is suspended therein while the coal is being raked from the sides thereof, a heavy cloud of dust rises and obscures the light so that no glare therefrom is seen through these holes. One witness testified that under such circumstances the coal "makes a terrible fog," and that the incandescent light in the bin looks like a star, or "like a light in a dense fog."

The petition charges that plaintiff's injury was due to the negligence of defendant, (1) in allowing the first "trapdoor" in this coal bin to remain open, without warning to plaintiff of such fact, and (2) in not providing sufficient lights in and about such portion of the premises. The first of these, however, was abandoned at the trial, and the case went to the jury on the theory, alone, that there was substantial evidence to support the averments of the petition to the effect that defendant had negligently failed to furnish adequate light upon this platform, rendering the place not a reasonably safe one in which to work, by reason whereof plaintiff came to his injury.

It is urged that the trial court erred in not sustaining defendant's demurrer to the evidence. Much of the argument in support of this assignment of error is to the effect that plaintiff, being the foreman in charge of the building, was responsible for his own acts and that of his subordinates as well; and that if there was any negligence either in leaving open the hole into which he fell or with respect to the lighting of the place, it was his own negligence for which he cannot recover.

This argument might be sound if the case made by the evidence proceeded upon the theory of negligence on the part of the box tender in leaving open the man-hole into which plaintiff fell; but this is not the fact. The case went to the jury upon the theory that there was evidence of negligence on the part of defendant

in failing to furnish adequate light, proximately resulting in plaintiff's injury, sufficient to warrant the submission of this issue. And it appears that plaintiff, as shift foreman, was not responsible for the lack of sufficient lights upon the platform. It is true that during his "shift," of eight hours each day, if he found an electric light bulb broken or worn out it was his duty to report it, and he did so; but he testified, and it is not contradicted, that he had no authority to install additional lights or any control of the method of lighting the plant, except as stated above. The lack of sufficient light at the place in question, if any, arose from the fact that defendant had not seen fit to keep a permanent light over this coal bin so situated as to light the platform about these manholes. The evidence is that originally, but prior to plaintiff's employment, defendant maintained a light over each of these sixteen bins, but that later one-half of these were taken off, leaving a light over each alternate bin. The reason for this does not appear; but it was doubtless for the sake of economy. When the light at the head of the stairway was suspended in bin number 1 (which appears to have been a customary and proper use thereof) there was no light over this bin; and the evidence is that it was then so dark that one coming upon the platform—at any rate until his eyes became accustomed to the darkness—could not well discern the fact that a particular manhole was open. This being true we think that the evidence sufficed to take to the jury the question of defendant's negligence in respect to making reasonably safe the place in which plaintiff was required to work in the performance of the duties of his employment.

The duty to furnish light, i. e., to exercise ordinary care to see that the place was so lighted at night as to make it a reasonably safe place for plaintiff to pass over in the performance of his duties, was a continuing duty resting upon the defendant, for a

breach of which—proximately resulting in injury to plaintiff, while exercising ordinary care for his own safety—defendant may be held liable. [See *Wendler v. Peoples House Furnishing Co.*, 165 Mo. l. c. 537, 65 S. W. 737; *Carney v. Brewing Assn.*, 150 Mo. App. 437, 131 S. W. 165; *Irmer v. Brewing Assn.* 69 Mo. App. 17.]

From the evidence it cannot be said that plaintiff's injury was due to negligence on the part of the box tender in having both of these holes uncovered at the time. They were openings in the coal bin for use upon such occasions; and for aught that appears it may have been reasonably necessary to have both open on this particular occasion, while the box tender was actually working at the coal. On the other hand it does not appear from the evidence that it was always or even ordinarily necessary that they both be uncovered to rake down the coal; and hence it seems that the fact that plaintiff realized that one was open was not such notice to him that the other was uncovered also as to convict him of negligence, as a matter of law, in passing over the place where he met his injury, which place he says was a part of the "roadway" ordinarily used to reach the point to which he was going. The question of defendant's negligence and that of plaintiff's contributory negligence were, we think, for the jury.

It is a trite doctrine that in passing upon a demurrer to the evidence, the evidence must be viewed in the light most favorable to plaintiff, giving him the benefit of every inference favorable to him which may be fairly and reasonably drawn therefrom. And if the evidence is reasonably susceptible of two inferences, one lawfully supporting a right of recovery and the other fatal to plaintiff's case, leaving room for reasonable men to differ with respect thereto, the case is one for the jury. [See *Powers v. Transit Co.*, 202

Mo. l. c. 280, 100 S. W. 655; Morgan v. Mining Co., 100 Mo. App. l. c. 118, 141 S. W. 735.]

The answer pleads both contributory negligence and assumption of risk; and great stress is laid upon the argument that plaintiff was thoroughly familiar with the situation existing, both as to the lighting of the place and the location of these manholes, and had used this platform, with these conditions prevailing, without objection, for the period of about two years during which he was shift foreman, and that consequently he must be held to have assumed the risk of such an injury as that which befell him. But under the law in this State, as declared by repeated pronouncements of our courts, if defendant was negligent in failing to exercise ordinary care to perform the continuing duty to furnish a reasonably safe place to work, the danger arising therefrom was not a risk assumed by plaintiff. [See *Patrum v. Railroad*, 259 Mo. 109, 168 S. W. 622; *Crader v. Railroad*, 181 Mo. App. l. c. 537, 164 S. W. 678, and authorities cited.]

The questions involved on the demurrer are those of defendant's negligence and plaintiff's contributory negligence. As we have said, these we regard as questions for the jury, and hence we hold that the demurrer was properly overruled.

Complaint is made of plaintiff's main instruction, which does not require the jury to find that there was any negligence on the part of defendant in leaving this manhole in the platform open, but does require a finding that it was in fact open and that defendant had negligently failed to cause the premises in question to be so lighted as to enable plaintiff to discover such opening "in the ordinarily careful performance of his duties, and that plaintiff by reason of said negligence and want of care if any on the part of the defendant and as the result thereof and without fault

on his part fell into said coal tank," whereby he was injured.

It is said that the jury should have been required to find all of the specific acts of negligence charged in the petition. But this is a misconception of the rule which obtains where specific acts of negligence are pleaded. In such cases the plaintiff must recover, if at all, upon some one or more of such negligent acts charged which will constitute a cause of action in his favor. He is confined to the specific negligence pleaded (see *Beave v. Railroad*, 212 Mo. 331, 111 S. W. 52; *Crone v. Oil Co.*, 176 Mo. App. 1. c. 349, and authorities cited, 158 S. W. 417), but this does not mean that he must prove every negligent act charged. It is sufficient if, keeping within his petition, he prove actionable negligence.

It is also said that this instruction assumes that there was some negligence on defendant's part with respect to these manholes. But it quite clearly appears that this instruction neither assumes nor requires the finding that there was such negligence on defendant's part. The facts required to be found in this connection merely lead up to the negligence submitted, which has to do with the lighting of the premises.

Other questions raised are without merit or importance. We perceive no reversible error in the record, and the judgment should therefore be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

HOUSTON E. COPELAND, Appellant, v. AMERICAN CENTRAL INSURANCE COMPANY, Respondent.

St. Louis Court of Appeals, June 8, 1915.

1. **APPELLATE PRACTICE: New Trial: Remarks of Trial Court: Review.** An appellate court will not interfere, where the court below has refused to grant a new trial because of remarks of the court in the hearing of the jury, alleged to have been prejudicial to the complaining party, unless it is convinced, from an examination of the whole record, that the remarks were of such a character as to constitute prejudicial error.
2. ———: ———: ———: ———. The matter of granting a new trial on account of remarks made by the trial court during the trial rests almost exclusively within the sound discretion of that court, and hence, although such remarks are not such as would have justified the appellate court in reversing the judgment, had the motion for a new trial been overruled, nevertheless where the trial court grants a new trial on account thereof, such order will not be interfered with, on appeal, unless the trial court palpably abused its discretion in making it.
3. ———: ———: ———: ———. On appeal from an order granting a new trial on account of remarks made by the trial court during the trial, *held* that, although the remarks were not such as would have justified a reversal of the judgment, had the motion for a new trial been overruled, nevertheless it was within the power of the trial court to grant a new trial on account thereof, and, in view of the fact that the evidence was evenly balanced and that the verdict was concurred in by nine jurors only, the appellate court could not say that the trial court palpably abused its discretion in granting a new trial.
4. **FIRE INSURANCE: Defenses: Fraud and Deceit: Sufficiency of Evidence.** In an action to recover the amount of a draft drawn by defendant fire insurance company, payable to insured and by him indorsed and delivered to plaintiff, in payment of a claim under a fire insurance policy issued by defendant, which draft defendant thereafter declined to pay, defended on the ground that plaintiff and others had conspired together for the purpose of acquiring properties with the view of procuring fire insurance thereon, grossly in excess of the value thereof, caus-

ing the same to be destroyed by fire, and collecting insurance thereon, and that, pursuant to such conspiracy, plaintiff and others acquired the property described in the policy issued by defendant, procured fire insurance thereon, including the policy issued by defendant, grossly in excess of the value of the property, and caused the same to be destroyed by fire, evidence held sufficient to warrant the submission of this defense to the jury.

5. **FRAUD AND DECEIT: Establishment: Evidence.** Since the law presumes that men are honest and actuated by correct motives, fraud is never presumed, and evidence which merely raises a suspicion of fraud will not suffice as proof of the existence thereof; but it is entirely legitimate to infer fraud from surrounding facts and circumstances which point directly to its existence.
6. ———: ———: ———. In a civil case, where plaintiff's fraud is set up as a defense, it is not necessary that proof of his guilt be such as would be necessary to convict him of a crime.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED AND REMANDED.

H. A. & C. R. Hamilton, Thomas J. Rowe and Seneca C. Taylor for appellant.

(1) Remarks made by the trial judge are not ground for granting a new trial, unless they are made improperly and are of a character to prejudice the jury against one of the parties. *State v. Teeters*, 239 Mo. 475; *Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71; *Farrar v. Railroad*, 249 Mo. 210; *Landers v. Railroad*, 134 Mo. App. 80; *Tuck v. Traction Co.*, 140 Mo. App. 335; *Steltemeier v. Barrett*, 145 Mo. App. 534. (2) There is no substantial evidence in the record to sustain the affirmative defense set forth in the answer and a verdict for defendant would be unsupported by proof. *State v. Jones*, 106 Mo. 302; *State v. Morney*, 196 Mo. 43; *Spencer v. Ins. Co.*, 79 Mo. App. 213; *Spiro v. Transit Co.*, 102 Mo. App.

250; American Ins. Co. v. Smith, 73 Mo. 368; Glover v. Ins. Co., 130 Mo. 173; Monaghan v. Ins. Co., 53 Mich. 238; Decker v. Ins. Co., 66 Me. 406; Boyd v. Glucklich, 116 Fed. 131; Pauley v. S. G. & L. Co., 131 N. Y. 90; Yaggle v. Allen, 48 N. Y. Supp. 827; Haywood v. State, 43 So. 614.

George L. Edwards and *A. H. Roudebush* for respondents.

(1) The conduct of the trial judge fully justified him in granting a new trial. *Simon v. State*, 117 S. W. (Tex.) 143; *Hutchinson v. Richmond Safety Gate Co. et al.*, 247 Mo. 71; *Wright v. Richmond*, 21 Mo. App. 76, 81; *Dreyfus v. Railroad*, 124 Mo. App. 594; *I Thompson on Trials* (2nd Ed), section 219; *Hinzman v. Railroad*, 182 Mo. 611. (2) Appellate courts will lean toward affirming rather than reversing orders granting new trials. *Rickroad v. Martin*, 43 Mo. App. 597; *Parker v. Britton*, 133 Mo. App. 270; *Schmidt v. Railroad*, 149 Mo. 269. (3) An appellate court may, in passing on the weight of the evidence, consider any points made in motion for a new trial, though not assigned by the trial judge as grounds for granting a new trial. *Emmons v. Quade*, 176 Mo. 22; *Dale v. Golden Rod Mining Co.*, 110 Mo. App. 317; *Chandler v. Gloyd*, 217 Mo. 394; *Hawman v. McLean*, 139 Mo. App. 429; *State ex rel. v. Thomas*, 245 Mo. 65; *Roney v. Organ*, 176 Mo. App. 234. (4) Where a trial judge grants a new trial on the ground of his own conduct, his order will be treated by the appellate court as a matter of discretion, and not disturbed. *Septowski v. St. Louis Transit Co.*, 108 Mo. App. 307. (5) Fraud can be established by circumstantial evidence and the weight of the evidence in this case is against the plaintiff. *Cooley on Torts*, 475; *St. Francis Mill Co. v. Sugg*, 206 Mo. l. c. 155.

ALLEN, J.—This is an action to recover the amount of a draft drawn by defendant upon itself, payable to one Blockburger and one Taylor, trustee, and by them indorsed and delivered to plaintiff, in payment of a claim upon a policy of fire insurance issued by defendant; which draft defendant thereafter declined to pay. This is the second appearance of the case in this court. The first trial resulted in a judgment for the defendant which was reversed by this court, on the former appeal, for error in giving an instruction. [See *Copeland v. Insurance Co.*, 158 Mo. App. 338, 138 S. W. 557.] Upon the second trial, before the court and a jury, there was a verdict for plaintiff, but the court set it aside and granted defendant a new trial. From the order granting a new trial plaintiff prosecutes this appeal.

The pleadings upon which the second trial was had are the same as set out in substance in the opinion of this court on the former appeal. When the case was called for trial defendant, in open court, admitted liability on the second count of the petition, upon which plaintiff had elected to stand, for the amount therein demanded, unless it establish its affirmative defense set up in the answer. This affirmative defense is that long prior to the issuance of the policy of insurance, and at all of the times referred to in the answer, plaintiff and others had combined and conspired together for the purpose of acquiring properties and equities in properties with a view to procuring fire insurance thereon, grossly in excess of the value thereof, causing the same to be destroyed by fire and collecting insurance thereupon; that pursuant to such combination and conspiracy, plaintiff and others acquired the property described in the policy issued by defendant, procured fire insurance thereon, including the policy issued by defendant, grossly in excess of the value of the property, and caused the same to be destroyed by fire. And defendant averred

that it had issued the above mentioned draft in ignorance of the matters so pleaded in defense.

The defendant, to sustain the burden cast upon it to establish its affirmative defense, called plaintiff as the first witness, later calling Blockburger and one Dunaway, these being the three persons chiefly concerned in the transaction leading up to the procuring of the policy of insurance issued by defendant. The defense rests in large measure upon the testimony of these adverse witnesses who, as defendant contends, conspired to fraudulently obtain and did obtain insurance upon the property in question, grossly in excess of its value, and caused it to be destroyed by fire; though other evidence was adduced by defendant to support the averments of its answer.

It appears that on or about March 4, 1909, Dunaway acquired a piece of real property in St. Louis county, perhaps a mile or more from the corporate limits of Ferguson, known as the January homestead. The property consisted of approximately twenty-seven acres of land with a large residence thereon, which appears to have been originally a costly and handsome structure, but which was then old and out of repair. It had not been occupied for some years, except by a caretaker. Dunaway purchased the property through the Mississippi Valley Trust Company of St. Louis, a corporation, the agent of the owners thereof, for the sum of \$13,500. He represented himself as the agent of one Guy S. Sturges to whom he caused the property to be conveyed. Sturges, however, was but a "straw man." At the time, the property was encumbered by a first deed of trust for \$8000. There was also a second deed of trust of record thereon for \$7000, but it appears that this did not represent an actual loan upon the property and was controlled by the owners. Dunaway paid in cash the difference between the amount of the first deed of

trust and the said purchase price, less certain commissions allowed him in the transaction.

On March 19, 1909, Dunaway caused the title to the property to be transferred by Sturges, by warranty deed, to George O. Blockburger, the consideration expressed in the deed being \$25,000. In the meantime a deed of trust had been executed to one Frank X. Hackman to secure a principle note of \$15,000 and interest notes. Dunaway testified that he had arranged with Hackman to make such loan before he had completed his purchase of property, telling Hackman that it was to take up an encumbrance of like amount then on the property. It is said, however, that Hackman found himself unable to make a loan to this extent and that in lieu thereof he advanced \$7,000, leaving the first deed of trust for \$8,000 on the property, his deed of trust becoming a second lien. Plaintiff, Dunaway and Blockburger, by their testimony, seek to make it appear that Blockburger purchased the property from Dunaway in good faith, for the price of \$25,000, paying in cash \$10,000 for the equity above the original mortgage for \$8,000 and the Hackman mortgage for \$7,000; Blockburger procuring from plaintiff, Copeland, \$5,000 secured by a third deed of trust upon the property, to aid him in making the payment of this \$10,000.

Plaintiff, Dunaway and Blockburger claim to have met at plaintiff's residence in the city of St. Louis where Blockburger's purchase was consummated. According to their version of the transaction, some paper showing title in Sturges was shown plaintiff, together with a warranty deed from Sturges to Blockburger; plaintiff paid over to Blockburger \$5,000 in currency, receiving a third deed of trust upon the property, though he says that his previous understanding was that his was to be a second mortgage; and Blockburger in turn paid Dunaway the \$5,000 received from plaintiff together with the fur-

ther sum of \$5,000, likewise in currency, to complete the purchase.

It is defendant's contention that this transfer to Blockburger was a mere sham, as were also the pretended loans of plaintiff and Hackman; that no consideration ever passed in any of these transactions, and that they were carried out on paper for the purpose of making it appear that there was a large equity in this property (which was untrue) in order to procure additional insurance upon the improvements; the whole being a scheme to defraud, and being but a part of a conspiracy to acquire equities in properties improved by old buildings, and, through the placing of fictitious loans thereon, to secure insurance far in excess of the value of the improvements, and then cause the buildings to be destroyed by fire.

Though plaintiff had a small bank account, and had, at various times, accounts with different banks, the \$5,000 claimed to have been paid by him in making the loan upon this deed of trust was not deposited in bank. He claims to have had the amount on hand in currency. Likewise Blockburger, though he had an account at a bank, where he had, as he says, but little on deposit, and who likewise had kept accounts with other banks, did not have on deposit the additional \$5,000 claimed to have been paid by him in currency when he purchased the property. Each claimed to have saved and accumulated such sum in currency. Likewise Dunaway could not tell what had become of the \$10,000 claimed to have been so paid him for the putative equity in the property. He did not deposit it in bank. He at first said that his recollection was that he took the money to his home. Then he stated that he thought that part of it had been put in a safe deposit box and a part left with Hackman. Finally he says: "I don't know what I did do with the money." At any rate there is no evi-

dence of any such sums of money, except the testimony from the lips of these three witnesses.

It appears that prior to the acquisition of the property by Dunaway, and until after the transfer to Blockburger, the insurance thereon was only \$8,000—sufficient to cover the amount of the original first deed of trust. After the transfer to Blockburger and the placing of the additional deeds of trust of record, insurance was procured thereon by Blockburger in the total sum of \$20,000. This included the policy for \$5,000 issued by defendant and here involved. Blockburger was named therein as the insured, but attached thereto, and made a part thereof, was the usual mortgage clause whereby the loss, if any, was made payable to S. C. Taylor, trustee, as his interest might appear; Taylor being the trustee in the deed of trust held by plaintiff. On or about May 19, 1909, some time after midnight, the building was totally destroyed by fire.

Blockburger testified that he was preparing the building for use as a "club house;" that he had been doing certain painting therein, and had moved in certain personal property; that his brother, one Harry Blockburger, and one Shilling "had been staying there all the time sleeping in the property," but that no one was at the house when the fire started. That night plaintiff and Blockburger were together at a card party in the city of St. Louis. Blockburger admitted that a few days prior to the destruction of the house he had received four notices of the cancellation of other insurance policies on this property, such notices being to the effect that within a certain time the insurance companies issuing the notices would cancel the insurance; and that the fire occurred before the expiration of the time mentioned in such notices.

Plaintiff testified that upon learning of the fire he turned his "papers" over to Blockburger who placed the claim in the hands of an insurance adjuster.

On August 11, 1909, defendant caused the draft in question to be issued, and it was endorsed by Blockburger and Taylor, trustee, delivered to plaintiff, and by him deposited in bank. Plaintiff thereupon drew a check against such deposit for the sum of \$5,000, the amount of the draft, payable to Dunaway, and delivered it to the latter. The explanation of this given by plaintiff and Dunaway is that it was done pursuant to a prior agreement that plaintiff would lend this sum to Dunaway secured by a mortgage on some land in Tennessee.

From testimony of competent real estate dealers, adduced by defendant, it appears that the entire property was not worth more than thirteen or fourteen thousand dollars, and that the value of the building did not exceed five or six thousand dollars. Opposed to this is the testimony of two local builders produced by plaintiff, but who do not appear to have been qualified to give expert opinions as to real estate values, who placed the value of the building at from \$20,000 to \$25,000.

There is much testimony in the record, pertaining not alone to this transaction but to others of a like character in which Dunaway figured, plaintiff being a party to one of them, Hackman being concerned with another, and there being evidence to connect Blockburger (alias George Scott) with a third. The evidence pertaining to the merits, however, need not be here further detailed.

Defendant's motion for new trial, among other things, charges that the court committed error in making prejudicial comments during the trial of the case, setting out the same. The court sustained the motion upon the ground, as stated in its order, "that the court, during the trial, made certain comments, and by its manner at the time, in making one of them, is likely to have prejudiced the jury against the defendant."

During the examination of plaintiff by defendant's counsel, plaintiff was being questioned with respect to the state of his bank account at and about the time of the depositing of the draft by him. It appears that on July 7, 1909, his bank book was balanced showing a balance in his favor of \$243.89; and that on July 23d he made a deposit of \$50. The record shows that while defendant's counsel, Mr. Edwards, was examining him as to the amount which the bank book showed to his credit, the following occurred: The Court: "Introduce the book in evidence if you want to." Mr. Edwards: "I want to see if he can figure it up." A. (The witness): "I ain't no bookkeeper." The Court: "Don't you think this man can add up two or three figures?" Mr. Edwards: "Yes." The Court: "Add that up, take a pencil and add that up." (Tosses his pencil to witness.)

It is this occurrence at the trial to which the court has reference in its order when it says that the court's manner (towards defendant's counsel) may have been such as to prejudice the jury against the defendant; though in the court's memorandum filed in passing upon the motion reference is made to another remark made by the court in the course of the trial, complained of and set out in the motion. The latter occurred when an objection to a question was interposed by plaintiff's counsel upon the ground that it pertained to an issue not tendered by the pleadings. In passing upon the objection the court said to defendant's counsel: "To permit you to show that might enable you to lay a trap for the plaintiff, omit to allege defense in your answer and when plaintiff comes into court unprepared, you could turn around and rely on some other defense than that set forth in your answer." Defendant's counsel objected to the court's remark saying: "There is no intention of laying a trap." Thereupon the court replied: "I did not say that you were laying a trap and did not mean to inti-

mate that there was anything dishonorable in your conduct." And the court then told the jury that what was said was not to be construed as a reflection upon defendant's counsel, and that the jury should not "take it as in any way derogatory to defendant's counsel or defendant's case."

The motion for a new trial complained of a further remark of the court in the hearing of the jury. At the close of the examination of witness Dunaway, a question was asked the witness by defendant's counsel pertaining to a matter that had been previously gone over. This being objected to, defendant's counsel said that he had forgotten what statement the witness had made as to the matter. The court thereupon said: "Suppose you had a very poor memory and had forgotten all of his testimony, would you ask the whole thing be repeated?"

I. Appellant bitterly complains of the action of the trial court in depriving him of the benefit of a verdict, obtained as the result of a trial of considerable length involving no little expense to the litigants and the State, because of remarks by the court which it is said could not reasonably be supposed to have had the effect of influencing the jury against defendant. It is said that the remark to which the court referred in its order, and the accompanying action of the court in tossing a pencil to the witness, constituted a mere trivial incident, occurring in the earlier stages of the trial, which, if it had any slight effect upon the jury, was doubtless forgotten by them before the trial closed.

And in support of the contention that the conduct of the court during the trial was not such as to warrant the granting of a new trial, we are referred to the following cases upon which appellant relies, viz: *Farrar v. Railroad*, 249 Mo. 210, 155 S. W. 439; *Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71,

152 S. W. 52; *State v. Teeters*, 239 Mo. 475, 144 S. W. 445; *Steltmeier v. Barrett*, 145 Mo. App. 534, 122 S. W. 1095; *Tuck v. Traction Co.*, 140 Mo. App. 335, 124 S. W. 1079; *Landers v. Railroad*, 134 Mo. App. 80, 114 S. W. 543. But these are all cases in which the appellate court declined to reverse a judgment on appeal because of alleged prejudicial remarks of the trial judge, where the latter had not seen fit to exercise his discretion in favor of granting a new trial. These authorities serve merely to illustrate the rule that an appellate court will not interfere where the court below has refused to grant a new trial because of remarks of the court in the hearing of the jury, alleged to have been prejudicial to the complaining party, unless the appellate court is convinced from an examination of the whole record that the remarks were of such a character as to constitute prejudicial error. Here the court, in the affirmative exercise of a broad judicial discretion reposed in it, has granted a new trial because of remarks and conduct on its part which the court deemed prejudicial to the rights of the respondent. And we are asked to reverse the court's order, made in the exercise of such discretion.

Though it be true that the court's remarks complained of in the motion for new trial are not such as would have justified us in reversing the judgment, had the motion been overruled, it does not follow that we should refuse to accord to the trial court the right, in the exercise of its discretion, to set aside the verdict because of what occurred at the trial. The trial judge knew not merely the language of the remarks made (which is necessarily all that we have in the cold record before us), but knew also his own manner and demeanor, and was in a position to judge of the probable effect of the same upon the jury, under the particular circumstances present and in view of the nature of the case on trial. This record upon its face does not disclose any conduct on the part of the trial court

of a character such as to constitute reversible error. But the trial judge, who knew his own accompanying actions and manner, and had the opportunity to observe the impression made upon the jurors, deemed his remarks and manner prejudicial to the respondent; and, impelled by a conscientious regard for the proper performance of his duty in the premises, granted a new trial on account thereof. In view of the fact that we do not occupy the favorable position that he did, to judge of the matter, we do not see how we could say that nothing prejudicial occurred, and that he abused his discretion in making the order appealed from.

In *Septowski v. Transit Co.*, 108 Mo. App. 307, 83 S. W. 286, which was an appeal from an order granting a new trial because of remarks of the court, this court in an opinion by GOODE, J., said:

“Setting aside a verdict for the reason assigned in the present instance, must be classed with the same ruling when made because the verdict was against the weight of the evidence, and treated as so far within the trial judge’s discretion that an appellate court will not disturb the order unless an abuse is palpable; which is not the case in this instance. In truth, that a judge thought he had made prejudicial remarks in the course of the trial which affected the jury, may more appropriately be treated as a matter of discretion than his view of the evidence. It is extremely unlikely that one will grant a retrial because of remarks in the hearing of the jurors, unless he observes something in their demeanor to induce the belief that harm has been done.”

In this connection see also: *Rickroad v. Martin*, 43 Mo. App. 1. c. 603, 604; *Hutchinson v. Safety Gate Co.*, 207 Mo. 1. c. 111, 112, 152 S. W. 52; *Dreyfus v. Railroad*, 124 Mo. App. 1. c. 593, 594, 102 S. W. 53.

The court did not set aside the verdict as being against the weight of the evidence. On the contrary

in its memorandum the court says that it is not disposed so to do, adding: "It is because the issue is so close that the court feels that there was great likelihood that its language and actions may have turned the scales in favor of plaintiff." The action of the trial judge was predicated upon a survey of the case as a whole, as made by the evidence, and what he conscientiously regarded as the probable effect of his own remarks and demeanor as a factor contributing to the result. In this connection it may be noted that the verdict was by nine jurors, three refusing to sign it. While under our law a verdict by three-fourths of the jury, in civil cases, is now as binding as a unanimous verdict, the fact that but nine jurors concurred in this verdict is, we think, a matter which may properly be reckoned with in the appeal before us. Jurors are often quick to catch what they regard as some indication of the views of the trial court as to the merits of the action, and may be readily influenced by the betrayal of any hostile feeling on the part of the court toward a litigant or his counsel, or by anything which may convey the idea that the sympathy of the court is with one party. And a verdict such as this may result from an impression made upon the mind of one juror alone by inadvertent remarks or conduct of the trial judge.

The matter is one resting almost exclusively in the sound discretion of the trial judge. In order to reverse the ruling appealed from we must, at least, be prepared to say that the court palpably abused its discretion in granting a new trial. Under the circumstances we do not feel justified in so holding.

II. But appellant insists that there is no substantial evidence in the record to sustain the affirmative defense pleaded and sought to be established by defendant, and under the evidence adduced a verdict for defendant could not stand; that the court should have

directed a verdict for plaintiff; and that therefore its action in setting aside a verdict in plaintiff's favor should be reversed. It is very ably and forcibly argued that defendant's evidence does nothing more than create a suspicion of fraud on plaintiff's part. And great stress is laid upon the fact that there was no direct proof that the old January residence was willfully destroyed by anyone.

We have carefully considered the argument so advanced, and the authorities cited and quoted from in support thereof, but we do not regard defendant's evidence as constituting no substantial proof in support of its affirmative defense. Plaintiff's counsel evidently did not so regard it at the trial, for no demurrer was offered at the close of the evidence in support of such defense, though one was interposed at the close of all the evidence.

Undoubtedly the great weight of the evidence on the subject is to the effect that the building was in fact insured in an amount grossly in excess of its value. Indeed it is doubtful if there can be said to be any competent evidence to dispute this. The twenty-seven acres of land, together with the old house upon it, was doubtless worth no more than Dunaway paid for it, and the evidence almost conclusively so shows. It is safe to say that there was no "equity" above this, and it is extremely unlikely that the sale to Blockburger and plaintiff's mortgage were *bona fide*; and the facts and circumstances attending these transactions are such as to warrant the finding that they were conceived in fraud.

At the time of these transactions plaintiff was a barber, though he had formerly been a carpenter. He says that he also conducted rooming houses. George Blockburger had been a bricklayer, plasterer, and pool room keeper, and was a dramshop keeper at the time of the trial below. Dunaway, formerly a carpenter,

appears to have been a trader or dealer in properties of one sort or another. He was shown to have figured conspicuously in other transactions such as that here involved. In each instance the insurance was increased upon some old building, to cover an apparent equity, which from the evidence appears not to have been real, and within a short time the building was mysteriously destroyed by fire. In one of these plaintiff took a leading part. The property (the Murdock farm in St. Louis county) was transferred to him in 1908 by a dummy acting for Dunaway—after the latter, as here, had increased the encumbrance thereon for a consideration (according to the papers) approximately double the real value of the land and improvements as shown by expert testimony. Plaintiff claims to have paid \$2500 in currency, and a deed of trust in the sum of \$1000 held by him on other property, for the equity. The insurance was accordingly increased to cover plaintiff's equity, and shortly thereafter the building was mysteriously destroyed by fire. Plaintiff collected the insurance and at once issued a check to Dunaway for a thousand dollars. The giving of this check is attempted to be explained by testimony to the effect that plaintiff happened to meet Dunaway and the latter happened to have in his pocket the deed of trust received from plaintiff in the deal and that plaintiff repurchased it. Though this transaction was assailed at the first trial, plaintiff was here unable to produce any satisfactory evidence that such a deed of trust ever existed or to locate the property upon which it was supposed to have been a lien.

Plaintiff, though a man of business experience, but having little if any knowledge of real estate values in the community in question, consummated his part of the January transaction having seen the property but once, according to his testimony, without further inquiry or advice, and at a time when Blockburger had no title thereto, lending, as he claims, \$5,000 in cur-

rency, the savings of years, upon a third deed of trust thereon. Blockburger, who is said to have parted with \$5,000 in currency in purchasing the equity, could not tell whether he had visited the property once or twice before buying it. One Warren, the caretaker in charge of the property for the original owners, and likewise his wife, testified that plaintiff first came to see the property in the latter part of 1908, in company with Dunaway who introduced him as "Mr. Curtis;" that plaintiff, known as Curtis, came out again on March 17, 1909, in company with Blockburger, whom he introduced as "Mr. Sturges;" and that Blockburger, or Sturges as he was known, then announced that he had bought the property, though he had never been on it before.

It is true that real money has not ceased to be a medium of exchange, and that men often act incautiously and imprudently; but the acts of these parties and the surrounding circumstances, which speak louder than their own words, indicate that this was not a genuine money transaction, but one on paper only. It has the distinctive earmarks of fraud.

From all the facts and circumstances shown in evidence we think that a jury could well find that the January property was willfully destroyed as a part and parcel of an extensive conspiracy to defraud. Certain it is that the positive evidence is abundant to the effect that the property was insured in an amount grossly in excess of its actual value. And the circumstances surrounding the real estate transaction, the destruction of the building and plaintiff's attempted disposition of the proceeds of defendant's policy, when all elements thereof are considered, are such as to readily give rise to the inference that the whole was an iniquitous scheme to obtain the proceeds of insurance policies, consummated by the final act of causing the building to be fired—before the cancellation of certain policies thereon could become effective.

Since the presumption is that men are honest and actuated by correct motives, fraud is never presumed. Neither will evidence which merely raises a suspicion of fraud suffice as proof of the existence thereof. [See *Troll v. Spencer*, 238 Mo. l. c. 101, 102, 141 S. W. 855; *Cummings v. Parker*, 250 Mo. l. c. 439, 440, 157 S. W. 629; *Troll v. St. Louis*, 257 Mo. 653, et seq., 168 S. W. 167.] However, it is entirely legitimate to infer fraud from surrounding facts and circumstances which point directly to its existence. "Fraud is rarely ever susceptible of positive proof, for the obvious reason that it does not cry aloud in the streets not proclaim its iniquitous purposes from the house tops. Its vermiculations are chiefly traceable by covered tracks and studious concealments." [*Massey v. Young*, 73 Mo. l. c. 273, 274; *St. Francois Mill Co., v. Sugg*, 206 Mo. l. c. 155, 104 S. W. 45.] "Fraud, originating in oblique cunning, is often deeply laid away and may be got at alone by the keenest scrutiny, by acute probing and sometimes by the aid of indirection, a weighing and shifting of motives, and, again, the putting together of trivial circumstances may furnish persuasive evidence of fraud." [*State ex inf. v. Standard Oil Co.*, 194 Mo. l. c. 154, 155, 91 S. W. 1062.] "Very slight circumstances therefore, may, although apparently trivial and unimportant of themselves, afford, when combined together, irrefragable proof of fraudulent intent." [*Hopkins v. Seivert*, 58 Mo. 201; *State ex inf v. Standard Oil Co.*, *supra*; *Cummings v. Parker*, *supra*].

This is a civil case, and it is not necessary that proof of plaintiff's guilt be such as would be necessary to convict him of a crime. Anything—by way of legitimate inference from facts shown in evidence—which satisfies the mind and conscience that the acts charged were perpetrated, and that plaintiff was a participant therein, ought to suffice to support the affirmative defense pleaded.

We think that the case is one for the jury.

The order granting a new trial will therefore be affirmed and the cause remanded. It is so ordered. *Nortoni, J.*, concurs; *Reynolds, P. J.*, concurs in the result and in all said as above, except as to a verdict by nine jurors. His understanding is that under our Constitution a verdict in a civil case by nine jurors is just as conclusive in the appellate court as if by twelve. Nor does he understand the opinion holds any other way. But to avoid any misapprehension of that, he desires to make this observation.

EUGENE S. KLEIN et al., Executors, Respondents,
v. JOHN D. JOHNSON, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **CONTRACTS: Contract for Repurchase of Corporate Stock: Consideration.** A stockholder of a corporation, as part of a transaction whereby he sold for the corporation a number of shares of its "treasury stock," wrote a letter to the purchaser, in which, after reciting the terms of the sale, he stated that, in consideration of the buyer's "having purchased the shares at his request and on his recommendation, he would, when requested by the buyer, at any time within ninety days," after a designated date, purchase the stock from the buyer at the price paid by him. He also requested the buyer to remit the purchase price to him, which was done, and, pursuant to an arrangement with the general manager of the corporation, he retained one-half thereof to apply on an indebtedness owing to him by the corporation. *Held*, that the contract to purchase the stock from the buyer was supported by a consideration and was enforceable; the words, "having purchased," not indicating a past consideration, in view of the fact that the letter was part of the transaction.
2. **EXECUTORS AND ADMINISTRATORS: Contract for Repurchase of Corporate Stock: Right to Enforce.** A valid contract to repurchase corporate stock on the request of the purchaser, if such request was made within a certain time, was not personal to the purchaser, so that, upon his decease, the

Klein v. Johnson.

promisor was bound to purchase, if requested so to do by the promisee's personal representative within the time stipulated.

3. **SALES: Breach of Contract to Purchase: Remedies of Seller: Damages.** Where the buyer breached a contract to purchase corporate stock, the seller was not confined to a recovery of the difference between the market value and the contract price, but, upon tender of the stock, was entitled to recover the contract price.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

AFFIRMED.

Loomis C. Johnson for appellant.

(1) The offer contained in appellant's letter of November 24, 1909, to Judge Klein was unsupported by any valid consideration and therefore was and is unenforcible. *Bulkley v. Landon*, 2 Conn. 404; *Comstock v. Smith*, 7 Johns. 86; *Bank v. Striever*, 82 N. Y. 508; *Arend v. Smith*, 151 N. Y. 505; *McQuaid v. Baughman*, 167 Ill. 430; *Cleaver v. Lenhart*, 182 Pa. St. 285; *Howard v. McNeil* (Ky.), 78 S. W. 142; *Littlepage v. Pub. Co.*, 34 App. (D. C.), 264, and cases cited; *German v. Gilbert*, 83 Mo. App. 416; *Lungstras v. German Ins. Co.*, 48 Mo. 204; *McFarland v. Heim*, 127 Mo. 333; *Lingenfelder v. Brewing Co.*, 103 Mo. 593; *Lamp Co. v. Mfg. Co.*, 64 Mo. App. 118; *Moomaw v. Emerson*, 80 Mo. App. 318. (2) Even assuming for the sake of the argument that the offer evidenced by appellant's letter of November 24, 1909, was supported by an adequate consideration, yet any rights acquired thereunder by Judge Klein were personal with and to him and when the offer therein contained was not accepted, or when such rights were not exercised by him prior to his death, they did not descend to his heirs or executors. *McMillan v. Philadelphia*, 159 Pa. 142; *Ide v. Liser*, 10 Mont. 5; *Hopewood v.*

McCausland, 120 Ia. 218; Hanly v. Watterson, 39 W. Va. 214; Litz v. Gosling, 93 Ky. 85; Dodge v. Kiene, 28 Neb. 216; Levy v. Rother, 29 N. Y. Supp. 1057; Rivers v. Oak Lawn S. Co., 52 La. Ann. 762; Clark v. Mining Co., 28 Mont. 462; McQueen v. Chouteau's heirs, 20 Mo. 222; Boykin v. Campbell, 9 Mo. App. 495; Lansden v. McCarthy, 45 Mo. 106; Implement Co. v. Iron Works, 129 Mo. 222; Newton v. Newton, 11 R. I. 394; Mynell v. Surtees, 3 Smith & G. Rep. (Chan. Div.), 101, 117; Fulton v. Messenger, 66 S. E. 830; Dyer v. Duffy, 39 W. Va. 156; Rease v. Kittle, 56 W. Va. 269; Sutherland v. Parker, 75 Ill. 330; Arkansas Valley T. Co. v. Belder, 127 U. S. 390. (3) The court below erred in fixing the measure of damages. Lumber Co. v. Warner, 93 Mo. 386; Brown v. Asphalt Co., 210 Mo. 260; Diffenderfer v. Board of Public Schools, 120 Mo. 447; Whitmore v. Coats, 14 Mo. 9; Northrup v. Cook, 39 Mo. 208; Koeltz v. Bieckman, 46 Mo. 321; Rickey v. Ten Broeck, 63 Mo. 567; Masterson v. Mayor, 7 Hill, 61.

T. K. Skinker for respondents.

(1) The promise contained in appellant's letter of November 24, 1909, is founded on ample consideration. (a) The letter and the payment and delivery of the stock were all parts of one and the same transaction. (b) The alleged contract was oral and void under the Statute of Frauds (Rev. Stat., Sec. 2784). Bernhardt v. Walls, 29 Mo. App. 206. (c) Judge Klein made his check payable to defendant's order at defendant's request, and thereby assumed a risk. This is sufficient consideration. Flannagan v. Kilcome, 58 N. H. 442; Marks v. The Bank, 8 Mo. 316; Tucker v. Dolan, 109 Mo. App. 442, 446; Lindell v. Rokes, 60 Mo. 249; Williams v. Jensen, 75 Mo. 681, 685; Lancaster v. Elliott, 55 Mo. App. 249; Lamp Co. v. Manufacturing Co., 64 Mo. App. 115. (2) The obligation

sued on is not one personal to Judge Klein alone, but was intended as an assurance of the value of the stock, and is available to his executors. Fuller v. Dempster, Admr. of Beatty, 8 Pa. S. C. Cases, Annotated by Sadler, 546; Hayes v. O'Brien, 149 Ill. 403; Chamberlain v. Dunlap, 126 N. Y. 745; Kernochan v. Murray, 111 N. Y. 306; House v. Jackson, 26 Ore. 89; Kerr v. Day, 14 Pa. St. 112; Simmons v. Lide, 94 Ga. 553; Gustin v. School District, 94 Mich. 508; Couch v. McCoy, 138 Fed. 686, 703; Hardy Implement Company v. Iron Works, 129 Mo. 222; Boykin v. Campbell, 9 Mo. App. 495; Leahy v. Dugdale, 27 Mo. 437; City v. Clemens, 42 Mo. 69. (3) The trial court properly permitted the respondents to recover the price at which appellant agreed to take the stock. (a) Because the transaction is substantially an agreement for rescission. Laubach v. Laubach, 73 Pa. St. 387; Thorndike v. Locke, 98 Mass. 340. (b) The measure of recovery ought not to be different if this were held merely an agreement of sale. Dustan v. McAndrew, 44 N. Y. 72; 2 Parsons on Contracts, 484; Sedwick on Measure Damages, 282; Lewis v. Greider, 49 Barb. 606; Dehner v. Miller, 166 Mo. App. 504, 510; Oehler v. Fruit Co., 162 Mo. App. 446; Koenig v. Boat Mfg. Co., 155 Mo. App. 685; Range Co. v. Mercantile Co., 120 Mo. App. 428; Lumber Co. v. Lumber Co., 53 Mo. App. 561; Dobbins v. Edmonds, 18 Mo. App. 807; Black River Lumber Co. v. Warner, 93 Mo. 374; Roaring Fork Asso. v. Clemens Produce Co., 171 S. W. 584; Anderson v. Frank, 45 Mo. App. 482, 486; Stumpf v. Mueller, 17 Mo. App. 283; Crown Vinegar Co. v. Wehrs, 59 Mo. App. 493; Graham v. Jackson, 14 East, 498; 104 Eng. 693. (c) In cases where corporate stock is the subject of the sale the measure of recovery universally allowed is the contract price. Campbell v. Woods, 122 Mo. App. 719; Thorndike v. Locke, 98 Mass. 340; Pearson v. Mason, 120 Mass. 53; Duchemin v. Kendall, 149 Mass. 175; Madison v. Decker, 72 N. Y. 595; Fuller v. Demp-

Klein v. Johnson.

ster, 8 Pa. S. C. Cas. (Sadler) 546; Range Co. v. Mercantile Co., 120 Mo. App. 438, 448. The triple rule of recovery is approved everywhere. Van Brocklen v. Smeallie, 140 N. Y. 70; Hayden v. Demets, 53 N. Y. 426; Quick v. Wheeler, 78 N. Y. 305; Higgins v. Murray, 73 N. Y. 252; Schwarzer v. Brewing Co., 74 N. Y. App. Div. 382; Lincoln Shoe Co. v. Sheldon, 44 Neb. 279, 290; McClure v. Williams, 5 Sneed, 718; Hamilton v. Finnegan, 117 Iowa, 623, 627; McCormick Co. v. Markert, 107 Iowa, 340; Harris Mfg. Co. v. Marsh, 49 Iowa, 11; Rosenbaum v. Weeden, 18 Gratt. 785; Crawford v. Avery, 35 Miss. 209; Bagley v. Findlay, 82 Ill. 524; Barrow v. Window, 71 Ill. 214; Cook v. Brandeis, 3 Met. (Ky.) 355; Bell v. Offutt, 10 Bush, 632; Mitchell v. Le Clair, 165 Mass. 308. And the rule applies to sales of real estate as well as personal property. Brown v. Slec, 103 U. S. 828; Briggs v. Munchon, 56 Mo. 467; Oatman v. Walker, 33 Me. 67; Alna v. Plummer, 4 Me. 258.

ALLEN, J.—In November, 1909, the late Judge Jacob Klein, of the city of St. Louis, purchased 6667 shares of the "treasury stock" of the Pearl Tatum Mining Company, of the par value of \$1 each, for which he paid \$1000. For some time prior thereto, one Tatum, the general manager of the mining company, had endeavored to sell Judge Klein some of this stock. Tatum had formerly been a practicing attorney in the city of St. Louis, but had removed to the State of Colorado. He visited St. Louis from time to time, and in April or June, 1909, he first saw Judge Klein in reference to the sale of stock to the latter. He had a number of interviews with Judge Klein, but was unable at that time to consummate a sale. In October of the same year he procured the assistance of defendant in the premises, the latter being a heavy stockholder in the company and a creditor thereof as well. He and defendant saw Judge Klein at the latter's office,

but nothing definite was accomplished and Tatum returned to Colorado, but before doing so urged defendant to see Judge Klein further in regard to the matter, and later wrote defendant to the same effect. On November 17, 1909, defendant wrote Tatum informing him that he (defendant) had sold the above mentioned shares of stock to Judge Klein, requesting that a certificate therefor be issued and sent to defendant for delivery accordingly. This was done, and on November 24, 1909, defendant wrote the following letter to Judge Klein, enclosing therewith the certificate of stock, viz.: "Dear Sir:

"I am handing you herewith certificate No. 393 for 667 [*sic*] shares (par value \$1.00 each) of the Pearl Tatum Mining Company, made out in your name, for which you are to pay 15 cents a share or a total of one thousand dollars, and in consideration of your having purchased the said shares at my request and on my recommendation, I hereby agree when requested by you, at any time within ninety days next after the 19th day of November, 1910, to purchase the said shares from you and pay you therefor the sum of 15 cents per share, or the aggregate sum of one thousand dollars.

"Please make the check for the enclosed shares in my favor. Also sign and return me the receipt for the shares which is pinned to the certificate, and oblige."

Pursuant to the request contained in defendant's letter Judge Klein sent his check to defendant, payable to the latter, for \$1000, and retained the stock for which he executed a receipt to the company. Judge Klein died on August 23, 1910; and on January 25, 1911, his executors, plaintiffs herein, tendered the stock to the defendant and demanded payment of the said sum of \$1000. Defendant having declined to make such payment, this suit was instituted to recover the amount with interest.

The trial, before the court without the intervention of a jury, resulted in a judgment for plaintiffs for the amount demanded, with interest, and the case is here upon defendant's appeal.

The court below held that the plaintiffs could maintain their action on the contract contained in defendant's letter. This ruling we think correct; and we are of the opinion also that no fault may be found with the amount of the recovery. Learned counsel for appellant, however, challenges plaintiffs' right to recover at all, for reasons to be briefly noticed, and further contends that in no event should the judgment have been for more than nominal damages.

It is argued that defendant's letter, of November 24, 1909, was unsupported by any valuable consideration, and was therefore a mere *nudum pactum* and unenforcible. As this argument proceeds, the letter written by the defendant to Tatum on November 17, 1909, shows that the stock had then been sold to Judge Klein; that the purchase of the stock was a past consideration, so far as it had to do with the obligation of defendant evidenced by the letter; and that there was no independent consideration for defendant's said agreement to take the stock from Judge Klein within ninety days after November 19, 1910, at the price paid therefor by the latter. And it is said that the following language of the letter itself shows that the purchase of the stock was a past consideration for defendant's said promise, viz.: "In consideration of *your having purchased* the said shares at my request and on my recommendation, I hereby agree," etc.

But we perceive no merit in the contention that the contract contained in defendant's letter was without a present valuable consideration. It quite clearly appears that the sale to Judge Klein was actually consummated by the defendant, and that defendant's letter quoted above was a part and parcel of the transaction. This letter also contains a request that Judge Klein

make his check payable to defendant personally, which was complied with. And it further appears that defendant, pursuant to a prior arrangement with Tatum, retained one-half of the proceeds of the check to apply upon an indebtedness of the company to him, forwarding the remainder to the corporation.

That there was ample consideration for defendant's promise sued upon we think cannot be doubted. The argument that the letter shows upon its face a past consideration for the promise needs but passing notice, in view of the actual facts attending the transaction. The words "having purchased" can no more be said to import a past consideration than the term "for value received" contained in the ordinary promissory note. Whether or not there was a present valuable consideration for the promise is to be determined from the facts disclosed by the record.

A further contention is that the obligation sued on was one personal to Judge Klein, which did not descend to his executors and administrators. This question is briefed and argued at length, but we do not regard it necessary to discuss the many authorities cited and relied upon by learned and industrious counsel for appellant, for we do not deem them in point. It is argued that the letter constituted an offer to Judge Klein, giving him the option to elect either to retain the stock or to call upon defendant to take it at the price paid therefor; that such offer contemplated an election by Judge Klein personally, who was well known to defendant, the personal element entering into the transaction, and that such right of election was one which could not be exercised for Judge Klein by his executors. But we cannot agree with counsel as to the nature and effect of the promise contained in the letter; and our view thereof renders inapplicable the theory thus advanced. The letter, as we regard it, constituted a solemn agreement to pay a certain definite sum of money within ninety days after November

19, 1909, upon demand therefor, and tender of the stock, within said period. And it was not a contract in which the *delectus personae* entered as a material factor. The right given to Judge Klein by the contract was the right to demand the payment of a certain sum of money upon tendering the stock. This was certainly a property right which descended to his executors. Nothing more than a futile demand was necessary to give rise to a cause of action on the contract. This demand his executors could make, and have made; and we perceive no reason why they may not maintain an action for a breach of the contract.

It is further argued that the court erred in regard to the measure of damages recoverable as for a breach of the contract; that plaintiffs could recover, if at all, only the difference between the market value of the stock and the price which defendant agreed to pay therefor, and since plaintiffs did not show the market value their recovery should have been confined to nominal damages only. It is said that the rule recognized by the trial court, giving to the vendor an election of remedies where the vendee breaches his contract to purchase, and which is sanctioned by many rulings of the Courts of Appeals in this State, is out of harmony with the decisions of our Supreme Court.

In *Stewart Produce Company v. Gamble-Robinson Commission Company*, 189 Mo. App. 654, 175 S. W. 319, we recently had occasion to consider the choice of remedies ordinarily available to a vendor. The question is fully discussed in *St. Louis Range Company v. Mercantile Company*, 120 Mo. App. 438, 96 S. W. 1040, and in *Oehler v. Fruit Company*, 162 Mo. App. 446, 142 S. W. 811. It is quite unnecessary, therefore, to dwell upon the matter here, or to review at length the authorities in this State. Upon the facts of this case we think that the plaintiffs are entitled to recover the amount paid to defendant by Judge Klein and which defendant agreed to repay, upon tender of the stock.

It was so held in *Campbell v. Woods*, 122 Mo. App. 719, 99 S. W. 468, a case similar to this, which ruling was followed in *Bank v. Securities Co.*, 141 Mo. App. 524, 125 S. W. 1194.

Our holding we think in no wise conflicts with the decision of the Supreme Court in *Black River Lumber Co. v. Werner*, 93 Mo. 374, 6 S. W. 210, cited by appellant. Neither do we regard the ruling in *Brown v. Asphalt Mfg. Co.*, 210 Mo. 260, 109 S. W. 22, upon which appellant greatly relies, as affording authority for the contention that the measure of a vendor's damages is always the difference between the contract price and the reasonable market value of the goods.

As observed in *Koenig v. Boat Mfg. Co.*, 155 Mo. App. 1. c. 699, 135 S. W. 514, the plaintiff in the *Brown* case evidently pursued the theory that he was entitled to recover the difference between the contract price and the market value. And the opinion states that there was no evidence that the plaintiff had the goods on hand at his factory to be delivered to the defendant. The petition did not aver the tender of any specific property, nor seek to recover the contract price upon the theory that any such property was being held for the vendee, as his property. We do not think that the Supreme Court meant to say, as an inflexible rule, that the measure of a vendor's damages is always the difference between the market value and the contract price. And the case before us, upon the pleadings and the facts, is quite unlike the *Brown* case.

Here the defendant agreed to repurchase from Judge Klein certain shares of mining stock at the price paid by the latter therefor, upon demand. We can see no good reason why plaintiffs should not be permitted to recover the amount so agreed to be paid upon tendering the stock. That this ruling amounts practically to enforcing specific performance is no valid argument against it. [See *Campbell v. Woods*, *supra*, 1. c. 726.] The aim of the law is to put the parties, so far as

practicable, in the position in which they would have been had the contract been fully performed. Defendant is required to pay precisely what he agreed to pay and receives the stock. We think that plaintiffs should not be required to sell the stock in the open market for whatever it may bring, as a prerequisite to a recovery against defendant; nor do we perceive that this would be of any advantage to the latter.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

SAMUEL SPARKMAN, JR., Respondent, v.
WABASH RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **NEGLIGENCE: Instructions: Conformity to Evidence.** In a negligence action, no matter how broad the petition may be, the instructions should submit only the specific negligence developed by the evidence, and it is proper to withdraw, by instruction, issues pleaded that are not supported by the evidence.
2. **RAILROADS: Master and Servant: Injury to Engineer: Sufficiency of Evidence.** In an action for injuries to a locomotive engineer by an explosion of his engine, evidence held insufficient to justify a finding that the crown sheet, as distinguished from the stay bolts, was defective, and hence it was proper to withdraw that issue from the jury. [NORTONI, J., dissents.]
3. **MASTER AND SERVANT: Injury to Servant: Burden of Proof.** An employee, suing for personal injuries, has the burden of proving negligence of the employer and a causal connection between such negligence and the injury; and, where the injury might have resulted from one of two causes, for only one of which the employer is liable, the employee must show with reasonable certainty that the cause for which the employer is liable produced the injury.
4. **EVIDENCE: Burden of Proof: Evidence Evenly Balanced.** Where the evidence is evenly balanced, the party upon whom

Sparkman v. Wabash Railroad.

the burden of proof rests has failed to sustain his burden, and the adverse party is entitled to a verdict.

5. **APPELLATE PRACTICE: New Trial: Scope of Review.** While trial courts are vested with a wide discretion in granting new trials, yet a new trial, granted under a mistake of law, will be reversed, on appeal, unless it can be upheld on some other ground of the motion.

NORTONI, J., dissents.

Appeal from Monroe Circuit Court.—*Hon. William T. Ragland*, Judge.

REVERSED AND REMANDED (*with directions*).

J. L. Minnis and *David H. Robertson* for appellant.

(1) The verdict was for the right party; plaintiff was not entitled to recover, and the court should have given defendant's peremptory instructions. (a) There was no evidence that the defects testified to by plaintiff's witness, Hopson, caused the explosion; and (b) it could just as reasonably be inferred that the explosion was the result of low water as that it was the result of any other cause. *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202; *Byerly v. Light & Power Co.*, 130 Mo. App. 593; *Goransson v. Manufacturing Co.*, 186 Mo. 300; *Plefka v. Knapp, Stout & Co.*, 145 Mo. 316; *Kane v. Railroad*, 251 Mo. 13; *Warner v. Railroad*, 178 Mo. 134; *Beebe v. Transit Co.*, 206 Mo. 419; *Coin v. Lounge Co.*, 222 Mo. 488; *Trigg v. Land & Lumber Co.*, 187 Mo. 227; *Brown v. Land & Lumber Co.*, 65 Mo. App. 162; *Jones v. Yeager*, 2 Dillon, 68; *Dunphy v. Stock Yards Co.*, 118 Mo. App. 516; *Railway v. Dubois*, 56 Ill. App. 181, 65 Ill. App. 142. (2) There was no error in giving defendant's instructions No. 1 and No. 2. These instructions submitted to the consideration of the jury conditions testified to on behalf of plaintiff. (3) There was no

error in giving defendant's instruction No. 5. Byers v. Wallace, 28 S. W. (Texas) 1056; Deuchler v. Insurance Co., 51 Mo. App. 156; Blashfield on Instructions, sec. 349; Byerly v. Light & Power Co., supra; Warner v. Railroad, supra; Kane v. Railroad, supra; cases cited under point 1.

M. J. Lilly for respondent.

(1) Under the pleadings there was abundant testimony to take the case to the jury. (a) The defective condition of the crown sheet and its fastenings is conclusively shown, and there is evidence from which it may be reasonably inferred this caused the explosion. (b) All of the direct and positive testimony on the point negatives the contention that the explosion was caused by low water, because the water supply in the boiler was shown to be ample by the only two tests known—the gauge cocks and the water glass. (2) The giving of defendant's instruction number 1 and number 2 was error. (a) Said instruction number 1 ignores the allegation in plaintiff's petition and the evidence in support thereof as to the defective condition of the crown sheet and in effect directs a verdict for defendant unless the jury find that plaintiff was injured by reason of defective radial stays "and from no other cause." (b) Said instruction number 2 limits plaintiff's right of recovery in the same way. Instructions should be predicated on the whole case. *Frist National Bank of Warsaw v. Currie*, 44 Mo. 91; *Sheedy v. Streeter*, 70 Mo. 679. (3) The giving of defendant's instruction number five was error. This instruction authorized a verdict for defendant in this language: "If it appears as reasonable to you that said explosion was the result of water becoming low on or around said crown sheet as that it may have been due to defective radial stays

in the crown sheet, then you will return a verdict for the defendant." This instruction not only authorizes the jury to ignore the evidence as to the defective condition of the crown sheet, but commissions them to enter the field of speculation in arriving at a verdict. (4) Where there has been a misdirection of the jury by the court and the court is satisfied that an improper verdict was occasioned thereby, the court shall, on motion of the proper party, grant a new trial. Sec. 2022 R. S. Mo. 1909. (a) The granting of a new trial rests within the sound discretion of the court. *Farrell v. Transit Co.*, 103 Mo. App. 454; *Coleman v. Cole*, 96 Mo. App. 22; *Rodan v. Transit Co.*, 207 Mo. 392; *McCarty v. Transit Co.*, 192 Mo. 396; *Gould v. St. John*, 207 Mo. 619. (b) And the court's action will not be disturbed unless it appears that it used its discretionary power in an arbitrary or wrongful manner. *Taylor v. Railroad*, 163 Mo. 183; *Rodan v. Transit Co.*, 207 Mo. 392; *McCarty v. Transit Co.*, 192 Mo. 396; *Ridge v. Johnson*, 129 Mo. App. 541.

ALLEN, J.—This is an action for personal injuries sustained by plaintiff while in the employ of the defendant as a locomotive engineer. On November 9, 1910, while plaintiff was in charge of a locomotive engine of the defendant drawing a train of freight cars and proceeding from Hannibal to Moberly, in this State, the fire-box of the engine "let down," causing an explosion whereby plaintiff was slightly burned upon the wrist, and it is claimed that later, by reason of the explosion, his hearing became affected. It appears that the plaintiff had driven this engine with a train of freight cars from Moberly to Hannibal on the previous evening, and that at 1:20 a. m. on November 9, 1910, he began the return trip to Moberly. He had proceeded but about twelve and one-half miles from Hannibal when the explosion occurred.

The petition alleges that defendant negligently provided plaintiff with a locomotive that was dangerous, defective and unsafe for use, in that "the crown sheet of said engine and the fastenings by which it was held in place were weak, defective and insecure and liable to break and give way, thereby causing the boiler of said engine to explode." The testimony adduced by plaintiff to support these allegations of the petition will be noticed later.

Plaintiff's evidence shows that the engine left Hannibal with both the tank and boiler full of water, and tends to show that sufficient water was kept in the boiler to cover the crown sheet above the fire-box until at least a few minutes prior to the accident. The testimony of plaintiff and the fireman respecting the stage of the water in the boiler shortly prior to the explosion need not be stated. While it is to the effect that there was water over the crown sheet within a few minutes of the explosion, it does not appear to be inconsistent with the theory of the defense that in running down hill, after ascending an upward grade for about eight miles, the water ran forward in the boiler, and because of insufficient water therein the crown sheet was left uncovered, causing it to be burned out. And much testimony was adduced by defendant relative to the condition of the engine after the explosion, and expert opinions thereupon, tending to show that the crown sheet burned out and dropped from the stay bolts because it was not kept covered with water.

The trial, before the court and a jury, resulted in a verdict for the defendant. Thereafter the court sustained plaintiff's motion for a new trial upon the ground that error had been committed in giving three instructions for defendant. These instructions, numbered 1, 2 and 5, are as follows:

1. "The court instructs the jury that the burden is upon the plaintiff in this case to establish to the

reasonable satisfaction of the jury, by the greater weight of the evidence given in the case, that the plaintiff was injured by reason of defective radial stays in the crown sheet of said engine, and that by reason of said defective radial stays, and from no other cause, said crown sheet gave way and caused the explosion, and that plaintiff was injured thereby; and unless the plaintiff has so proven to your satisfaction, you will return a verdict for the defendant."

2. "The court instructs the jury that you cannot consider any defect in any part of the fire-box of said engine, except such defects as the evidence shows were in the crown sheet at the time of or prior to the explosion, and you will disregard all evidence in the case as to any defective stay bolts or radial stays in any other part of the engine, except in the crown sheet; and unless you believe from the evidence in the case that the explosion occurred as the result of defective radial stays in said crown sheet, then you will return a verdict for the defendant."

5. "The court instructs the jury that if you are unable to determine, from the evidence in the case, the cause of said explosion, or if it appears as reasonable to you that said explosion was the result of water becoming low on or around said crown sheet as that it may have been due to defective radial stays in the crown sheet, then you will return a verdict for the defendant."

Plaintiff's main instruction, following the lines of his petition, authorizes a recovery if the jury find that the explosion was caused by the negligence of defendant in furnishing plaintiff with an engine which was defective and unsafe for use by reason of *the crown sheet and the fastenings thereof* being weak, insecure, etc. This includes defects, if any, in the crown sheet itself as distinguished from the "fastenings" thereof, i. e., the stay bolts or radial stays. Defendant's instructions, on the other hand, withdraw from the

consideration of the jury any defective condition of the crown sheet separate and apart from the radial stays thereof. Defendant's instruction No. 2 does permit a consideration of defects in the crown sheet, but only in the radial stays therein as though such stays formed a part of the crown sheet.

Though the petition is broad enough to cover defects in the crown sheet generally, it was proper to confine the issue to the specific defects alone which the evidence tended to establish. For no matter how broad the petition may be, the instructions should submit only the specific negligence developed on the trial by the evidence adduced. [See *Feldeworth v. Railroad*, 181 Mo. App. 1. c. 640, 164 S. W. 711; *Miller v. United Rys. Co.*, 155 Mo. App. 528, 1. c. 546, 134 S. W. 1045.] The immediate question for consideration, therefore, is whether or not there is any evidence in the record to authorize the submission to the jury of any defect in the crown sheet apart from defective stay bolts.

The crown sheet is that portion of the boiler directly above the fire-box of the engine, forming the roof of the fire-box. Because of the great pressure upon it from above, and the fact that the fire is immediately beneath it, the crown sheet is supported by a great many bolts, or rods, extending through it and fastened into the boiler above, termed stay bolts or radial stays. It appears that there were more than four hundred of these in this crown sheet, the heads thereof being about four inches apart in the roof of the fire-box.

There is no evidence of any crack or other like specific defect in the crown sheet; and the only testimony that lends any color of support to respondent's contention in this regard is that of the witness Hopson, who was a boiler maker in the employ of the defendant at the time in question. He testified that he had examined this engine in Moberly, in the forenoon

of November 8, 1910, the day prior to the explosion. When asked as to the condition in which he found it, he answered: "I found five broken stay bolts and about six bolts pulling through the sheet." His further testimony touching the matter is as follows: Q. "How many did you say you found broken?" A. Six broken." Q. "And what was the condition of the others you found?" A. "Heads pulling through the sheet, heads pulled off, just like the heads pulled off the sheet, through the sheet." Q. (Mr. Robertson) "You said heads pulled off?" A. "Yes, sir." The evidence shows that the crown sheet dropped off from the heads of more than one hundred of these bolts at the time of the explosion; but there is no evidence, unless it be that of the witness Hopson, tending to show that prior thereto any of these heads were "pulling through the sheet."

The argument advanced in support of the court's action in granting the new trial is that the testimony of the witness Hopson to the effect that he found some of the heads of these stay bolts pulling through the sheet is some evidence of a defective condition of the crown sheet itself; i. e., that if the heads of some bolts—the witness says six—were pulling through the sheet this would mean a weakening of the crown sheet itself as distinct from the stay bolts. We have carefully considered this testimony, and do not see how it can be said to constitute any evidence that there were defects in the crown sheet as a thing separate and apart from the stay bolts. The argument that the ends of these bolts, extending down through the crown sheet, with heads on the lower side thereof and serving to form a part of the roof of the fire-box, constituted a part of the crown sheet, and that a defect in the heads or ends of the bolts would consequently be a defect in the crown sheet, avails nothing here; for to the extent that the ends or heads of the stay bolts may be said to constitute a portion of the crown sheet the jury were

at liberty to consider defects in the crown sheet under the instructions given. The question is whether the foregoing testimony tends to prove that the crown sheet was otherwise defective.

It is argued that by "heads pulling through the sheet" this witness meant that heads were being sunk into the sheet itself, thereby weakening the latter and rendering it defective. Of this it may be said that while the testimony of this witness is not altogether clear, there is nothing in our judgment to indicate that he meant to say that he found heads which, while remaining in their original form, were being pulled up through the sheet, thus making depressions therein of the size of the heads themselves. The rounded head of each stay bolt covered the crown sheet for a short distance about the hole through which the stay bolt extended, and was directly exposed to the fire. And the testimony of this witness evidently means nothing more than that he found six bolts, the heads of which—due to the great heat to which they were subjected, and the pulling strain upon them—were being forced off, and in some cases perhaps the head, softened by the heat, being to some extent drawn into the hole occupied by the stay bolt. He says that he found "heads pulling through the sheets, heads pulled off," and he attempts to explain this by saying: "Just like the heads pulled off the sheet, through the sheet." At this point defendant's counsel interposed this question: "You said heads pulled off?" And he answered: "Yes, sir." When he said: "Just like the heads pulled off *the sheet*, through the sheet," he evidently meant to explain that the bolt heads were being forced off and to some extent being pulled into the bolt holes in the sheet. And that this was the tenor and purport of his testimony further appears from his answer to the question then propounded to him by defendant's counsel, above set out. Nowhere does he refer to any depression made by any bolt head in the

crown sheet itself. And there is not a word of testimony elsewhere in the record to indicate that any defect whatsoever existed in this perforated sheet of steel which covered the fire-box.

The burden was upon plaintiff to adduce evidence tending to affirmatively show that the crown sheet proper was defective, if plaintiff wished to submit this question to the jury as a predicate of liability. But there appears to be no evidence that the crown sheet was defective, when considered apart from the radial stays. We therefore hold that the court committed no error in confining the issue to defective radial stays in the crown sheet, as it did by giving defendant's instructions, and that plaintiff's motion for a new trial should not have been sustained because of such supposed error.

It is argued that, in any event, it was error to give defendant's instruction number 5, instructing the jury to return a verdict for defendant if, from evidence in the case, they were unable to determine the cause of the explosion, or if it appeared to them just as reasonable that the explosion was the result of low water in the boiler as that it was due to defective radial stays. But we see no error in this. The burden was upon plaintiff to prove the negligence alleged, and to trace the cause of the explosion to such negligence, if any, with reasonable certainty, not leaving it in the fog of conjecture and speculation. Undoubtedly there was much evidence on defendant's part tending to show that the accident could not have happened and did not happen by reason of such defects in the radial stays as plaintiff's evidence tends to establish—assuming that such defects existed, which defendant disputed. Indeed it is here argued that there was no substantial evidence that such defects did cause or could have caused the explosion, and that the demurrer to the evidence should have been sustained; but we shall not go into this feature of the case. In view of the burden

resting upon plaintiff, we do not regard this instruction as erroneous. It devolved upon plaintiff to reasonably establish a causal connection between the negligence, if any, and the injury, and to show that the former was the proximate cause of the latter. If the injury might have resulted from one of two causes, for but one of which the defendant could be held liable, it was necessary for plaintiff to show with reasonable certainty that the cause for which defendant could be held liable produced the result. [See Warner v. Railway Co., 178 Mo. l. c. 134, 77 S. W. 67; Kane v. Railroad, 251 Mo. 13, 157 S. W. 644.] And unless the jury found that the evidence preponderated in favor of plaintiff on the vital issue in the case, it was their duty to find for defendant. If they regarded the evidence as to this evenly balanced defendant was entitled to a verdict. [See Denchler v. Insurance Co., 51 Mo. App. l. c. 156; Carlich v. Met. St. Ry. Co., 129 Mo. App. l. c. 728, 729, 108 S. W. 584.]

We conclude, therefore, that the court should not have set aside the verdict in defendant's favor. While trial courts are vested with a wide discretion in the matter of granting new trials, where, as here, a motion for new trial is sustained through a pure mistake of law, in the erroneous belief that error was committed at the trial, the court's action will be reversed on appeal unless it can be upheld on some other ground of the motion. [See Barr v. Hays, 172 Mo. App. 591, 155 S. W. 1095.] It is not contended that the order appealed from can be sustained on any other ground of the motion, and it quite clearly appears that it could not. The cause was fairly tried and no good reason appears for depriving the defendant of the benefit of the verdict received by it at the hands of the jury.

The order granting a new trial will therefore be reversed and the cause remanded with directions to reinstate the verdict and enter judgment for defend-

ant thereon. It is so ordered. *Reynolds, P. J.*, concurs. *Nortoni, J.*, dissents in an opinion filed.

DISSENTING OPINION.

NORTONI, J.—I dissent from the opinion of the court in this case because it unduly restricts the effect of the evidence, as I view it. The question in decision presents the inquiry as to whether there is substantial evidence tending to prove the crown sheet of the locomotive—that is, the roof of the fire-box—was defective at the time of the explosion. It is true much of the evidence pertains rather to the defective condition of the radial stays, but, even so, it appears to me there is an abundance in connection therewith to authorize a finding by the jury that the crown sheet too was defective. This evidence was given by the witness E. E. Hopson, who, it appears, was for several years a boiler maker in the employ of defendant at its round house in Moberly and inspected the fire-box, including the crown sheet, of the engine the very day before the explosion occurred. He made the inspection in the line of his duty and reported his finding at the time to the superior in charge of the work—that is, Ryan. After testifying that he had been in the employ of defendant as a boiler maker and engaged in the duties incident thereto for years at Moberly where this locomotive was in the round house, the following questions and answers appear:

“Q. How long had you been so employed? A. Thirteen years. Q. How long with the Wabash? A. Thirteen with the Wabash. Q. I will ask you what your duties were? A. My duty was to inspect the engine, and see what work was to be done, and do the work on it. Q. How did you make inspections of engines? A. Take a torch and go inside of the fire-box and look it over; take a hammer and hit on the bolts; look at the flues. Q. You may explain the construc-

tion of a crown sheet to the jury? A. Well a crown sheet is just like the roof to a house, to the fire-box, the water is between the fire-box and the wagon top that is out side of the boiler, the stay bolts or radial stays connect with this fire-box and wagon top and riveted in and hammered over on both sides. Q. What is the purpose of these radial stays or stay bolts? A. The purpose is to hold the fire-box. Q. To hold the fire-box in position? A. Yes, sir. Q. I will ask you if you inspected engine No. 2301 on that day? A. Yes, sir. Q. What time? A. In the forenoon. Q. That was on the 8th day of November, 1910? A. Yes, sir. Q. Where did you inspect it? A. In the round house at Moberly. Q. Now what did you do when you inspected that engine? A. Went in the fire-box, took the torch in, looked round over it, hammered over the stay bolts and listened for the sound. Q. What did you find with reference to the condition of the engine? A. I found five broken stay bolts and about six bolts pulling through the sheet. Q. Where did you find them? A. On the left front corner. Q. What report, if any, did you make of that condition?

“Mr. Robertson: Q. Did you make a report in writing? A. Yes, sir. Q. Did you—to whom? A. I made a report to Mr. Ryan. Q. I say, did you make a report in writing? A. No, sir. Q. Sign it? A. No, sir.

Examination continued by Mr. Phillips:

Q. Did you make a report to him of anything? A. I went and told the round house boiler maker the condition of the engine, he came and looked at it, he came down pretty soon, poked his head in the door and come back and said, “Cork her up and let her go, we have got to have her.” I went ahead and corked it up. Q. Who did you say the boiler maker was? A. Tom Ryan. Q. When was that? A. About ten o'clock I judge, in the forenoon. Q. Now what would be the effect of broken radial stays? A. Well, that be

weaken the crown sheet, if too many get broken pressure of steam break it down. Q. How many did you say you found broken? A. Six broken. Q. And what was the condition of the others you found? A. Heads pulling through the sheet, heads pulled off, just like the heads pulled off the sheet, through the sheet. Q. (Mr. Robertson) You said heads pulled off? A. Yes, sir.

Q. I will ask you, in your experience as a boiler maker, if the engine was in fit, proper condition to go on the road? A. No, sir. Q. Why? A. Because dangerous.

Counsel for defendant objects, asks be stricken out, conclusion of the witness, not stating facts.

Court: Objection overruled.

To which ruling of the court defendant then and there at the time excepted and still excepts. Q. What was there danger of? A. Crown sheet coming down. Q. What is the result of the crown sheet coming down? A. Blow up the boiler.

Cross-examination by Mr. Robertson:

Q. Well, what was it you went in this engine to do on that day? A. The report. Q. What work did you go to the engine to perform? A. I corked up crown bolts and flues.

Q. Well, now what did you do with engine 2301, what was the first thing you did when you got to the engine? A. Opened the fire-box door and went into the fire-box. Q. You did that of your own volition? A. Yes, sir. Q. What did you find inside of the fire-box? A. Flues leaking and stays pulling through. Q. You did not find any radial stays broken? A. Yes, sir. Q. Where were they? A. Up in the left front corner. Q. Now just describe the condition of those radial stays you found broken? A. Well them stays set like

O'Brien v. Heman.

this (indicating) crown sheet is oval. Q. Now those radial stays are above the crown sheet? A. Screw into the crown sheet.

Q. How did you discover they were broken? A. You can hammer and tell by the sound of them.

Why didn't you put it in safe condition? A. Do you have any idea what kind of a job that is? Q. No, you tell; you know; why didn't you go ahead and put it in safe condition? A. Why, I did not have the job of general overhauling; I did the light repair."

In my judgment, the court very properly set the verdict aside because the issue was submitted by instructions on the part of defendant, in the view that there was no evidence tending to prove the crown sheet was defective.

JAMES O'BRIEN et al., Respondents, v. AUGUST
HEMAN et al., Appellants.

St. Louis Court of Appeals, June 8, 1915.

1. **MUNICIPAL CORPORATIONS: Existence of Public Alley: Dedication: Facts Stated.** The owner of land dedicated a strip thereof for an alley, twenty feet wide, running east and west and which was not connected at either end with a street or dedicated alley. There was a traveled way from the east end of this dedicated strip, running diagonally across a vacant lot to a street; and another landowner, in conveying his land, reserved a strip of land, ten feet wide, for a proposed alley, connecting with the west end of the dedicated strip, and running westwardly to a street, and the other owners of abutting land erected their fences and outbuildings so as to leave open a strip twenty feet wide from the west end of the dedicated strip to such street. As thus located, the alley had been open and used and traveled by the public for probably twenty years, and the city, although it had never improved the surface of the

alley, had laid a sewer main therein and had granted a telephone company the right to extend its wires along the same. *Held*, that the alley as thus located and created was not a mere paper alley, but was a public alley, open for public travel; there being an actual dedication by the owner who reserved the strip for an alley and a common-law dedication by the owners who constructed their fences and outbuildings so as to leave a strip for an alley, and an acceptance thereof by the public by having used and traveled it as a public way.

2. ———: Injury to Pedestrian: Nuisance Adjacent to Alley: Liability of Owner and Tenant. Where the owner of abutting property constructs and maintains a nuisance adjacent to a highway, and lets the property in this condition, and the tenant continues to maintain or suffer the nuisance as before, both the landlord and the tenant are liable for injuries befalling one passing along the highway as a result of such nuisance.
3. ———: ———: ———: ———. Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, the owners and the tenant were both liable for the death of a traveler in the alley, who fell into the quarry through the chute.
4. ———: ———: ———: ———. Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, and a traveler in the alley fell into the quarry through the chute and was killed, the fact that a portion of the chute extended across the corner of an adjoining lot, before reaching the alley, so that the adjoining owner was also liable, did not release the owners of the lot on which the quarry was situated, or their tenant, from liability, since it was their duty to protect against the nuisance created and maintained by them.
5. ———: ———: ———: Evidence: Notice of Dangerous Condition. In an action against a lot owner for the death of a child who, while walking in an alley, fell into a quarry, the sides of which had been allowed to cave in, so as to encroach on the alley, evidence that a policeman had requested the owners to guard the place to prevent injuries to persons using the alley was admissible to show notice to the lot owners of the dangerous condition existing, notwithstanding the policeman had no authority to make such request.

6. **APPELLATE PRACTICE: Review of Findings: Rulings on Motion for New Trial.** Where one of the grounds of a motion for a new trial was based on affidavits as to remarks of plaintiffs' counsel in opposing defendants' request for a directed verdict, which defendants claimed prejudiced the jury against them, and plaintiffs filed affidavits by all the jurors stating that they did not hear the remarks, which were addressed to the court in an undertone, the trial court's denial of the motion precluded a review of this matter, on appeal.
7. **DEATH BY WRONGFUL ACT: Action by Parent: Damages.** In an action by parents for the wrongful death of their child, loss of society of the deceased child is not an element of damages.
8. ———: ———: ———: **Excessiveness of Verdict.** A verdict for \$4100, in favor of parents for the death of a twelve-year-old boy, who was bright and intelligent, and, although attending school, assisted his father some at his trade, was not excessive.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings*, Judge.

AFFIRMED.

Rogers & Koerner for appellant.

(1) The alley here in question existed merely on paper. It had never been thrown open to the public for travel. Hence, the city was under no duty to make it safe for travel; and neither owners nor occupants of private property adjoining same were required to guard places on their land which may have been dangerous. *Hunter v. Weston*, 111 Mo. 176; *Baldwin v. Springfield*, 141 Mo. 205; *Downend v. Kansas City*, 156 Mo. 60; *Ely v. St. Louis*, 181 Mo. 723; *Conner v. Nevada*, 188 Mo. 148; *Benton v. St. Louis*, 217 Mo. 687. (2) The owner of land upon which there is an excavation is under no duty to erect a fence between his property and adjoining private property. *Overholt v. Vieths*, 93 Mo. 422. Instruction c should, therefore, have been given. (3) A police officer has no authority

on behalf of the city to order a landowner to guard his property. The testimony of plaintiff's witness Carroll was, therefore, immaterial and incompetent and its admission was error. (4) The conduct and remarks of plaintiff's counsel while addressing the court in the presence and hearing of the jury upon the propriety of giving the peremptory instructions asked by defendants, were improper and prejudicial to defendants. (5) The verdict of the jury is without substantial evidence to support it. (6) The verdict is so grossly excessive as to indicate passion and prejudice on the part of the jury. It should, therefore, be set aside. *Partello v. Railroad*, 217 Mo. 645, 661. (7) An instruction on the measure of damages should not state that the amount of the verdict should not exceed the amount claimed in the petition. If it does so, the question of excessive damages arise, the probable effect of the instruction will be taken into account. *Les-senden v. Mo. Pac. Ry.*, 238 Mo. 247, 265; *Stid v. Mo. Pac. Ry.*, 236 Mo. 382, 405.

Holland, Rutledge & Lashly for respondents.

(This brief covers *O'Brien v. Adding Machine Co.*, *post*, also.)

(1) The alley in question was a public alley, dedicated and accepted; but whatever the status of the alley as a public way or thoroughfare, the appellants are liable (a) whether it is a public alley with full obligations on the municipality to care for the same; (b) a public alley by common-law dedication, estopping these appellants from questioning the rights of the public therein; (c) a long used public passageway over the appellants' land, generally used by the public for many years with the consent of appellants, express or implied. (2) Where a strip of ground is dedicated by appellants' grantor twenty-one years before the

accident by a recorded plat approved by the proper city officers, and appellants soon after took deeds bounding the land by the alley and referring to the plat; where the city passes an ordinance for the construction of a sewer through the alley and contracts for its construction, and the sewer is laid and used; where the city grants permits to erect telephone poles through the alley and the poles were erected; its police officers notify appellants to fence their quarry because dangerous to persons passing through the alley and send a written report of such notice to the chief of police in whose office it was kept on file; where during all this time the alley was used by the public by vehicles and traffic of all kinds, including coal wagons and automobiles, and where there was a solid line of sheds and fence facing the alley on one side, which can be reached in no other way, said strip will be considered a public alley, although not actually paved by the city and even though for a small space leading to Spring avenue there was no dedication, but a continuous strip over the private line had been long used for a public passageway along with the alley. *Benton v. St. Louis*, 217 Mo. 687; *Buesching v. Gas Light Co.*, 73 Mo. 219; *Drimmel v. Kansas City*, 180 Mo. App. 339; *O'Malley v. Lexington*, 99 Mo. App. 695; *Baldwin v. Springfield*, 141 Mo. 205; *City of Caruthersville v. Huffman*, 171 S. W. (Mo.) 323; 1 *Wood on Nuisances* (3 Ed.), sec. 120; *Elliott on Roads and Streets* (2 Ed.), secs. 152-3.

(3) Even if the city had no obligation with reference to the repair of the alley, the facts stated in paragraph I constitute a common-law dedication and the acceptance of deeds by the appellants from the same grantor who made the dedication, bounding the property by the alley and referring to the plat of dedication of the alley, estop these appellants from claiming that this was not a public alley as far as they were concerned. There is no possible theory on which these appellants

could have closed up the alley or shut the public out from it. *Heitz v. City*, 110 Mo. 624; *Drimmel v. Kansas City*, 180 Mo. App. 339; *Ragan v. McCloy*, 29 Mo. 356; *Rose v. St. Charles*, 49 Mo. 509; *Railroad v. Baker*, 183 Mo. 322; *Field v. Mark*, 125 Mo. l. c. 215; *Brown v. Carthage*, 128 Mo. l. c. 17; *Downend v. Kansas City*, 156 Mo. 60; *McGrath v. Nevada*, 188 Mo. l. c. 107; *Bauman v. Boeckler*, 119 Mo. l. c. 200. (4) If the so-called alley was a common public alley then the fee to the middle of the alley was in the appellants for the reason that appellants' grantor who dedicated the alley and conveyed the same to the city, thereafter sold the quarry property to appellants, describing it as bounded on the north by the alley, and any abandonment of the alley or failure of any kind to effect dedication gave the appellants an absolute fee to the center, they in any event owning the fee to the middle of the alley subject only to the right of the public to use the surface for passage. *City of Memphis v. Miller*, 78 Mo. App. 67; *Baker v. City of St. Louis*, 7 Mo. App. 432; *Betz v. Telephone Co.*, 121 Mo. App. 476; *Christian v. City of St. Louis*, 128 Mo. 115. (5) If the alley in question was not a public alley then the fee belonged to the appellants and they owed to the public who had been using the property as a right-of-way for a long time, with the knowledge of the appellants, the duty of not leaving unguarded excavations and pitfalls in the pathway. *Schaaf v. Basket & Box Co.*, 151 Mo. App. 35; *Chicago Junction Ry. v. Reinhardt*, 139 Ill. App. 53; affirmed in 235 Ill. 576; *Graves v. Thomas*, 95 Ind. 361; *Wheeler v. St. Joseph Stockyards & Terminal Co.*, 66 Mo. App. 260; *Beck v. Carter*, 68 N. Y. 283; *Hanson v. Land & Water Co.*, 58 Wash. 6; *Brinilson v. Chicago, Etc., R. R. Co.*, 144 Wis. 614; *Matthews v. Seaboard Air Line Ry. Co. (S. Car.)*, 65 L. R. A. 286; *Phipps v. Oregon, etc., Navigation Co.*, 161 Fed. 376; *DeTarr v. Brewing Co.*, 61 Pac. (Kan.) 689; *Allison v. Haner*, 62 S. W. 932;

Rooney v. Woolworth, 61 Atl. 366. On the same principle this obligation would rest upon the abutting property owners owning the fee to the middle of the alley, which was a public alley in all respects, but as to which the city had not accepted the obligation to repair. (6) An unguarded excavation near or extending into a public highway or a much traveled way used by the public is a nuisance for the maintenance of which all are liable who are responsible for its condition. Buesching v. Gas Light Co., 73 Mo. 228, and cases cited; Wiggin v. St. Louis, 135 Mo. 558; 1 Thompson, Negligence, secs. 945, 1228; Mathews v. Mo. Pac. Ry. Co., 26 Mo. App. 75; 29 Cyc. 1172; Loth v. Columbia Theatre Co., 197 Mo. 328; Bassett v. St. Joseph, 53 Mo. 290; Benton v. St. Louis, 248 Mo. 98. (7) Having tried their case upon one theory in the court below, appellants will not be heard upon another one here. Point II in appellant Burrough's brief is inconsistent with the instructions offered by it at the trial. Walker v. Owen, 79 Mo. 563; St. Louis v. Wright Contracting Co., 210 Mo. 491; Brier v. Bank, 225 Mo. 673; Koshkonong v. Boak, 173 Mo. App. 310; Dice v. Hamilton, 178 Mo. 81; Black v. Mo. Pac. Ry. Co., 172 Mo. 177. (8) Appellant's instruction number VI assumes the way in question to be a public alley. In that instruction the jury is informed "before you can find for plaintiffs, you must find and believe from the evidence that the public alley at the point where plaintiff's claim Francis slipped, was in such a dangerous condition that persons exercising ordinary care for their own safety could not have safely passed passed along the same." This commits appellants on the public character of the alley. (9) The Hemans cannot escape liability by claiming that if the Burroughs Company had fenced its land so as to guard this hole, the boy would not have fallen into their quarry, and the Burroughs Company cannot escape by claiming that if the Hemans had walled up their quarry,

the boy would not have fallen beyond their land. The law of this State is well settled that if the negligence of two tort feorsors combines to cause an injury, or if the accident would not have happened but for the concurring negligence of both parties, there can be a recovery against either or both, since the responsibility for a tort is several. *Bassett v. St. Joseph*, 53 Mo. 290; *Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71; *Clark v. St. Jo., Etc., Ry. Co.*, 242 Mo. 570; *The Joseph B. Thomas*, 81 Fed. 578; *City of Flora v. Pruett*, 81 Ill. App. 161; *Benton v. St. Louis*, 248 Mo. 98; *Pearce v. Kansas City*, 156 Mo. 230; *Newcomb v. Railroad*, 169 Mo. 409; *Vogelsang v. St. Louis*, 139 Mo. 127. (10) If the owner lets premises with a nuisance upon them and the tenant allows it to remain they are both liable; the owner for creating it and both for not guarding it. *Buesching v. Gas Light Co.*, 73 Mo. 219; *Grogan v. Foundry Co.*, 87 Mo. 321; *Mathews v. Ry. Co.*, 26 Mo. 75. (11) The parents are not limited to the value of services which might have been rendered by the child, but may recover in tort, upon the right which the child would have had if he had been injured and survived. Under the statute the damages should be left to the sound discretion of the jury. *Hennesy v. Brewing Co.*, 145 Mo. 104; *Proctor v. Railroad*, 64 Mo. 112; *O'Hara v. Gas Light Co.*, 131 Mo. App. 428; *Sharp v. National Biscuit Co.*, 179 Mo. 559; *Lee v. Knapp & Co.*, 155 Mo. 610.

NORTONI, J.—This is a suit under the wrongful death statute for damages accrued to plaintiffs because of the fault of the several defendants. Plaintiffs recovered and defendants prosecute the appeal.

Defendants are August Heman, John C. Heman, the Heman Construction Company, a corporation, and the Burroughs Adding Machine Company, a corporation. The Hemans and the Construction Company prosecute a separate appeal jointly, while the Bur-

roughs Adding Machine Company does likewise. Such distinct appeals will, therefore, be considered separately, but, in the interest of brevity, the same statement of facts will be employed to portray the general outline of the case. Such facts as are relevant and essential to the understanding of the arguments presented in the different appeals will sufficiently appear in the opinion concerning each.

Plaintiffs, the father and mother of Francis O'Brien, sued, as above stated, for damages occasioned as the result of his death, which occurred by his falling from an alley into the rock quarry situate on the property of the Hemans, but the immediate opening through which he was precipitated into the quarry was across the corner of a lot owned by defendant Burroughs Adding Machine Company which adjoined the Hemans. The several defendants are, therefore, sued as joint *tortfeasors* in rendering the highway dangerous, as if each contributed in part to the death of the little boy.

We copy from plaintiffs' brief the statement of facts prepared by their counsel, which sufficiently sets forth the situation as to both appeals.

"There is very little conflict of testimony presented by the record in this case. The facts shown by respondents were, that on the 9th day of August, 1912, the minor child of plaintiffs, a boy named Francis O'Brien, aged twelve years, slipped into the quarry owned and operated by the Hemans, appellants here, and was drowned. At the time of the fatal accident the boy was walking eastwardly in the alley, which is between Laclede avenue and Forest Park boulevard, two public streets in a populous center in the central district of the city of St. Louis, Missouri.

"The alley in question is one hundred and eighty-two feet north of Forest Park boulevard and one hundred and eighty-two feet south of Laclede avenue, running parallel with both streets, and is built up

solidly on the north line by a row of sheds and fences inclosing the rear of a solid block of flat buildings facing Laclede avenue. Also on the north side of the alley, some seventy-five feet east of the quarry, was the factory building of the Johansen Bros. Shoe Company, where a force of from four hundred to five hundred workers were employed daily. Across the alley from these sheds and this line of fences the Hemans excavated to a depth of about one hundred and fifty feet, operating a quarry for several years, and, the quarry business having been terminated some time prior to the accident, they were at the time using it as a public dumping hole, for which they charged a fee for dumpage by the load, and for the convenience of which they had erected platforms upon the east and west side of the quarry. Having quarried up to the alley line, the north wall of the quarry presented a perpendicular surface of solid rock, on top of which the soil had slid into the hole in the process of time and through the beating and washing of rains, so that the line upon the surface representing the northernmost edge of the incline was nine feet and four inches into the alley, which, as dedicated and laid out, was twenty feet wide. Along that line the Hemans had erected a rude-two-plank fence, beginning at the west wall of the quarry and running east to a point three and one-half feet west of their eastern line and terminating with the last post eleven feet west of a point where the corner had washed into the quarry.

"The northeast corner of the quarry and all of the eastern side of the quarry were exposed and were not fenced or guarded in any way.

"At said northeast corner the ground had caved in in such a manner as to form a sharp incline or chute or slide, as it was variously called by the witnesses, into which it appeared the residents of the neighborhood had been accustomed, for many years, with the knowledge of the Hemans and without any

objection from them, to dump ashes and refuse. This chute ran at a sharp angle in a southwesterly direction to a point where it attained the corner of the perpendicular rock wall of the quarry proper and then dropped straight down to the water constituting the quarry pond. The hole was about one hundred and fifty feet deep, the water about sixty-five feet deep.

"Along the two-plank fence erected by the Hemans, and principally on the quarry side thereof, had grown grass, high weeds, sunflowers and vines overhanging the edge of the quarry-hole and having their branches and leaves protruding over and through the fence into the alley. Also along the row of fence and sheds, on the northern boundary of the alley, grass had grown several inches high. In the floor of the alley, where wagons traveled, were packed dirt, ashes and imbedded rocks.

"The alley was dedicated by the recording of a plat in the office of the recorder of deeds in the year 1892, and in May of that year the Board of Public Improvements certified to the fact that the dedication of said alley was in due and legal form and accepted the same.

"The defendant August Heman acquired his interest in the quarry property, which was an undivided one-half, on January 5, 1894, from the same person who had dedicated this alley and filed the plat of dedication above mentioned. In deeding the property to Mr. Heman it was described and the title conveyed: 'to an alley twenty feet wide, bounded north by said alley.' This deed referred to the recorded plat which had been accepted by the city two years before. The other undivided half interest in this property was acquired by John C. Heman in 1896, by deed from the same grantor, and similarly described the northern boundary of the property. A short time thereafter the property immediately to the east of the Hemans' property, and contiguous to the same alley,

was purchased by the Burroughs Adding Machine Company, and was similarly described and bounded in the deed. The business of operating the quarry, and thereafter of operating the dumping-hole, was conducted by the appellant Heman Construction Company, a corporation composed of the two Heman brothers, and Mr. August Heman, when called to the stand, testified on the point of use and occupation of the premises, as well as the operation of the quarry and the dumping-hole, as follows:

“Q. Who dug the quarry-hole this testimony is about? A. Heman Construction Company. Q. With your and Mr. Heman’s knowledge and consent—Mr. John Heman? A. Yes, sir. Q. After the rock was quarried out of it, what did you use it for? A. Use it as a dump. Q. How long have you been using it as dump? A. About three years, I guess. Q. Did you hire it as a dump? A. Well, I don’t know what you mean by the term “hire.” Charge so much to let them dump in there, that is all. Q. Has the Heman Construction Company got a written lease? A. No, sir. Q. Just operate it by consent of you and your brother? A. Yes, sir. Q. It was your and your brother’s enterprise and this corporation carried it on? A. Yes, sir. Q. During all the time taking out and filling in, too? A. Yes, sir.’

“The alley was dedicated more than twenty years before, and was used, according to the testimony, during that time and for more than ten years, as a driveway and public alley. The fence and line of sheds marking the north line of the alley was in direct line with the fence and line of sheds continuing westwardly on the other side of Spring avenue. Delivery wagons, express wagons, coal wagons, rag men, automobiles and wagons going and coming from the Johansen Bros. Shoe Company’s factory, which was situated north of the alley and some seventy-five or one hundred feet further east of the quarry hole, were accustomed to

drive up and down the alley, and had been for many years, according to the testimony of all the witnesses in this case, with the sole exception of Mr. August Heman, who expressed himself as 'surprised' at the great volume of testimony which he heard to this effect.

"In 1907 the city of St. Louis granted permission to the Bell Telephone Company to erect seven poles on the north side of the alley, and at that time an investigation and recommendation was made with reference to the granting of this franchise by the City Lighting Department of St. Louis. These poles were thereupon erected and a telephone line is at present located in the alley and by virtue of that permission from the city.

"In 1894 the city of St. Louis established, by ordinance, a sewer district in this territory, and thereafter let a contract and laid a sewer main in the alley past the point where the boy fell into the quarry. The evidence showed that there was a portion of the alley running east from Spring avenue a distance of ninety-three feet which had never been dedicated by any recorded plat, but that it was defined between the sheds and fence line, and the property contiguous to it was bought and sold with its lines for a boundary and the public had used it for many years the same as it had used that part of the alley which had been formally dedicated. In fact, appellant August Heman himself formerly owned and at one time sold the property contiguous to that strip and in his deed conveyed and described the property on the south as 'bounded on the north by a proposed alley twenty feet wide.'

"East of the quarry the alley had been dedicated straight through and connected with a north and south alley which was one hundred and twenty feet west of Grand avenue; but the property to the south of this alley, and to the west of the north and south alley just mentioned, being vacant, the public became accus-

tomed to travel diagonally across the lots and had left said eastern part of the alley untraveled for a distance of about one hundred and fifty feet west of the north and south alley, at which point it was again joined by the diagonal roadway, and constantly used. Just east of the last post of the Heman fence, so-called, the chute or slide, heretofore alluded to, had worn so far out into the floor of the alley as to be north of the fence line and was cut or scooped out to a distance extending more than one-half the width of the alley.

"At the time of the accident, parties in the neighborhood having cut their lawns, had brought the lawn grass and weeds, together with other rubbish, and thrown it into the mouth of this hole. The result was that the heavier articles of refuse had slid down into the quarry, while the grass and weeds had adhered and remained in the mouth of the chute and upon the floor of the alley around it in such manner as to make it impossible for any one to tell where the slide itself began.

"This twelve-year-old boy, coming east from Spring avenue up the alley, with a companion a year or so younger, was walking near the two-plank fence on the quarry side, and as he passed the post at the end of the fence, stepped upon the lawn grass and weeds by which the mouth of this chute was concealed. The grass slipped from under his feet and he slid into the quarry, either being killed by the fall or drowned before he could be rescued. His body was recovered the same day from the bottom of the quarry pond.

"The evidence showed that the mouth of this chute extended further east than the Hemans' property and was, in fact, about eight feet over the line of the Burroughs Adding Machine Company in the alley contiguous to that company's property. According to the testimony of two surveyors offered by plaintiff, the boy, in his descent, first slid over property which was in the alley, then over property owned by the Bur-

roughs Adding Machine Company, thence into the quarry owned, dug, operated and maintained by the two Hemans and the Heman Construction Company. The witnesses who saw the boy suddenly slip into the quarry testified that the hole was so concealed by the grass surrounding it that no one who was not perfectly familiar with the situation would be able to tell that there was any chute at the point where the boy slipped; four witnesses testifying to the effect that the boy seemed to be utterly oblivious to any danger, but walked straight along the alley until he stepped upon the grass surrounding this hole, and that he instantly disappeared as though the earth had swallowed him up.

“The evidence further showed that a police officer had notified Mr. Heman more than a year before the accident that this corner was dangerous and that some one was likely to slip into it and that Mr. Heman had at that time taken the position that the dangerous corner referred to was further east than his property extended and that it was the duty of the Burroughs Adding Machine Company to fence and guard the point. Thereupon the officer went to the Burroughs Adding Machine Company with the same complaint, receiving a promise from them that they ‘would look it up.’

“The dispute between appellants as to whose line the hole was upon, which began at that time, was maintained throughout the trial and is carried into this court by the briefs of counsel. The plaintiffs below offered no instructions, except upon the measure of damages and the definition of ‘ordinary care’ as applied to children and minors.

“The appellants offered and the court gave fourteen instructions, one of them limiting the measure of recovery under plaintiffs’ instructions and the other thirteen setting out and defining defendants’ theories of defenses.

“The jury returned a verdict for \$4100.

“Upon the filing of motions for new trial, appellants filed certain affidavits, being those of August Heman and counsel for each of appellants, with reference to arguments made to the court on the question of demurrers to the evidence at the close of plaintiffs’ case, which, according to the affidavits were made in the presence and hearing of the jury and were highly prejudicial to the jury. Respondents, however, immediately thereafter filed the affidavits of all twelve of the jurors, of the clerk in the court room where the cause was tried, and of the reporter who took the stenographic notes of the proceedings, to the effect that no argument was made within the hearing of the jury; that the jurors did not hear the arguments, and that they deemed the discussion which was carried on in an undertone to be that of legal questions with which they were not concerned. Neither did the memory of the trial judge coincide with the statements made in Mr. Heman’s affidavit and the motions for new trial were overruled.”

The accompanying photographs portray the condition of the alley, and one of them, in part, that of the quarry mentioned in the evidence. However, the condition of the quarry has changed in the interim, in that it appears to have been largely filled in after the accident and before the photograph was taken, but nevertheless it reveals the slide referred to in the evidence which commences in the alley, crosses the corner of the Burroughs Adding Machine property and penetrates into the quarry of the Hemans.

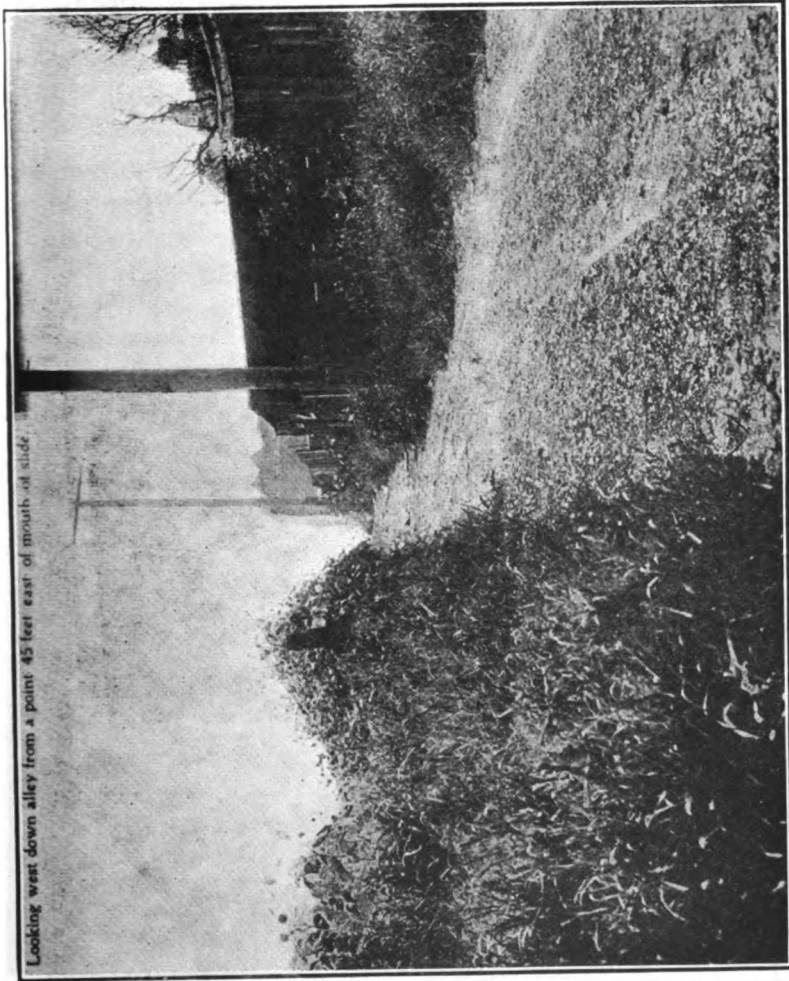
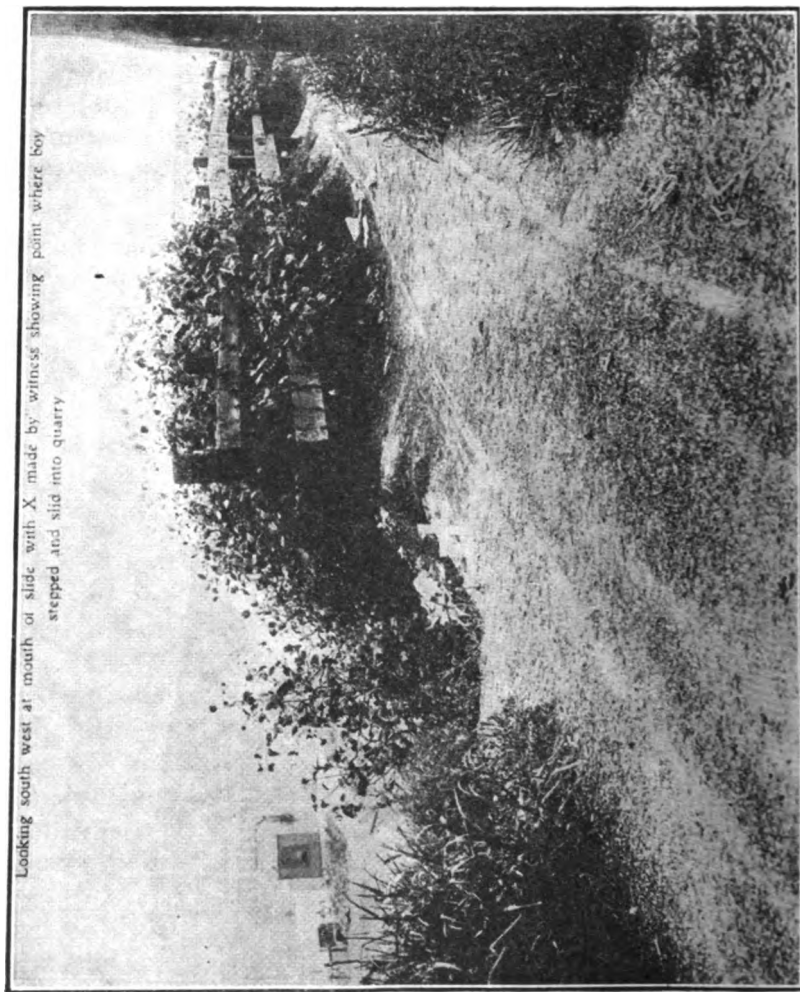


EXHIBIT 5.



Looking south west at mouth of slide with X made by witness showing point where boy stepped and slid into quarry

EXHIBIT 6.

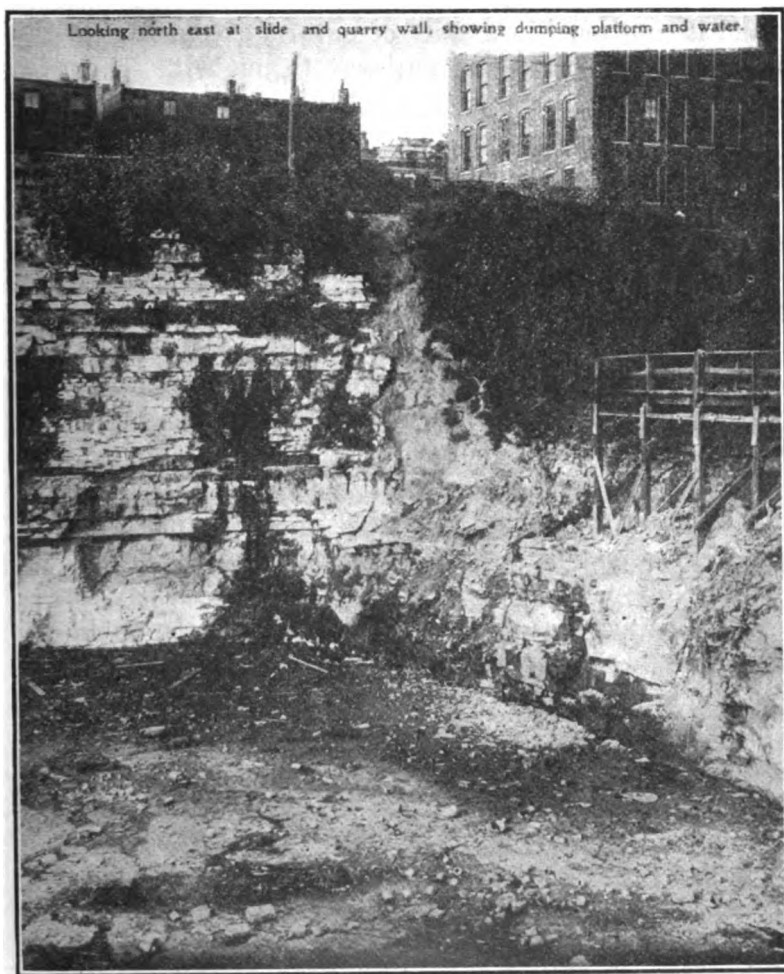


EXHIBIT 7.

The evidence is, that the alley, though traveled and used by the public generally, had never been improved under the authority of the city—that is, paved—and it continued in a state of nature, except for the traveled wagon road and pathway through it. Then, too, it appears the west end of the alley as platted did not intercept any public street, but concluded ninety-three feet east of Spring avenue, and the east end—that is, some distance east of the quarry—was obstructed by a shed attached to the barn of Scruggs, Vandervoort and Barney. In view of these facts, it is earnestly argued that the alley was a paper alley only and may not be regarded a public way of the city, as was declared in *Hunter v. Weston*, 111 Mo. 176, 19 S. W. 1098. But it is clear the authority relied upon is without influence here, for there the alley involved had never been open, was inclosed by a wall at either end and merely existed on the paper plat, while in the instant case it is otherwise.

The alley involved here was platted as early as 1892, and it appears that it has been open to the public ever after. On the east, it connected with a north and south public alley shortly west of Grand avenue, but it is true a shed was built across it by an adjoining proprietor so as to obstruct the east outlet thereof into the north and south alley. But the lot of ground adjacent was vacant and the public travel through the alley merely turned south of the shed and passed into Forest Park boulevard by that route, which appears to be well marked. It is true, too, that the west end of the alley, as platted, did not intercept a public street, for it terminated on the plat ninety-three feet east of Spring avenue, but many years ago the alley was actually opened clear through to the westward, so as to connect with Spring avenue, an important public thoroughfare north and south. Indeed, the defendant, August Heman, in conveying the land west of the quarry and east of Spring avenue, reserved in the deed

ten feet for a proposed alley, continuing the alley north of the quarry directly west to Spring avenue. It appears the adjoining proprietors on either side of this ninety-three foot space erected their fences and out-houses leaving open a twenty-foot alley way from the west end of the alley originally platted to Spring avenue. Thus, for probably twenty years, according to the evidence, the alley has been open and has been used and traveled by the public from Spring avenue eastward across the ninety-three-foot space, which was not originally platted, then upon the platted alley way along the north side of the quarry, and also the Burroughs Adding Machine Company lot, which lies immediately east of the quarry and then over the roadway to the south of the shed across a vacant lot to Forest Park boulevard.

Many years ago, the city constructed a sewer in the alley and thus exercised authority over it; likewise it granted public service corporations a franchise to erect their poles and pass their lines through the same. Although it be true that the ninety-three-foot portion of the alley as now existing—that is, as marked by the fences and adjoining structures—was not originally platted, a common-law dedication on the part of the adjoining proprietors with respect to the ten feet on the north side sufficiently appears, and defendant August Heman actually dedicated by deed ten feet from his land theretofore conveyed on the south side of that strip, by expressly reserving it in the deed as a proposed alley. The public at large accepted this dedication, both of that portion involved in the original plat and the portion so dedicated by Mr. Heman and other proprietors lying between Spring avenue and the alley originally platted, for they have used and traveled it continuously as a public way during all of these years.

The record abounds with evidence of public use of the alley, not only by those driving and

passing through it, but by the acts of the city officers in exercising authority over it above indicated as well. In such circumstances, it is entirely clear that the alley was a public one and open for public travel. Plaintiff's son is, therefore, entitled to be regarded as an invitee in a public way at the time of his death. [See *Benton v. City of St. Louis*, 217 Mo. 687, 118 S. W. 418.]

It appears that defendants August and John C. Heman owned and operated the quarry adjacent to the alley and that it was about one hundred and fifty feet in depth. In the quarry it is said the water was sixty-five feet in depth. It is true the quarry was in possession of the Heman Construction Company, who had formerly worked it, and this company was a corporation owned by its codefendants, August and John C. Heman. No retaining walls had been constructed on either the north side of the quarry or at the northeast corner, where the dangerous runway, or slide, appears, and several feet of the alleyway had caved therein—that is, about nine feet, it is said. This condition, it appears, had obtained for several years. Indeed, the quarry was a dangerous place and had been threatening to those who passed through the alley for years prior to the Hemans giving possession over to the Heman Construction Company. Plaintiffs' son, while passing through the alley at the south side of the traveled way, stepped upon an accumulation of green grass that had been tossed from adjoining lots into the runway, which opened in the alley immediately adjacent, but a few feet east of the northwest corner of the lot of the Burroughs Adding Machine Company, and was precipitated a few feet across the corner of such lot into the quarry, where he came to his death through drowning in the pond at the bottom.

No one can doubt that if the owner of abutting property constructs and maintains a nuisance adjacent to the highway and lets such property in this condition—that is, with the nuisance thereon—as the Hemans

did to their construction company, and such tenant continues to maintain or suffer the nuisance as before, both the proprietor and the tenant are liable for such injuries as may befall one passing along the highway, as a result of their negligence in omitting to exercise ordinary care to guard or render secure the passage. [See *Buesching v. Gaslight Co.*, 73 Mo. 219; *Grogan v. Broadway, etc. Co.*, 87 Mo. 321; 1 Thompson on Negligence, section 1159.] Although it be true that the place where plaintiff's little boy fell into the slide, or runway, was in the alley northeast of the corner of the Heman quarry and adjacent to the lots of the Burroughs Adding Machine Company, these defendants, the Hemans, are not relieved of liability on that score, for they created and, in conjunction with their tenant, the construction company, maintained the nuisance adjacent to the highway. Such being true, the mere fact that an obligation to fence the highway at the precise point where the boy stepped into the runway rested upon the adjoining proprietor—that is, the Adding Machine Company—is wholly immaterial here, for it devolved upon these defendants to protect against the nuisance created and maintained by them. [See *Wettor v. Dunk*, 4 Fos. & F. 298.]

It appears that the police officer on the beat discovered the danger which inhered in the situation a year before, and called the attention of Mr. August Heman to the same, with a request that he guard against injuries because of it, to persons using the alley. It is argued the court erred in admitting this evidence, for it is said a policeman is without authority to give direction to owners as to what should be done with respect to their private property. The proposition thus stated may be conceded as generally true, but, nevertheless, the evidence was entirely competent and proper, for it tended to show notice of the condition of defendants so as to suggest precaution to pro-

tect against such damages that might have been anticipated as within the range of reasonable probability.

It is argued the jury were prejudiced by remarks and arguments adduced by plaintiffs' counsel to the court when defendants interposed their request for a peremptory instruction and the judgment should be reversed because of this. Obviously this argument is wholly without merit, for it appears to have been tried out as a question of fact before the court on the motion for a new trial and resolved against defendants. Whatever the purport of the remarks of counsel and the argument directed to the court at the time, the jurors, each and all, say in their affidavits filed in support of the verdict that they did not hear them. The remarks, it appears, were addressed to the court in a low tone and the jurors say they paid no attention to them and did not hear what is said to have been an "impassioned appeal," or any of the statements made by counsel, in urging the court to refuse the peremptory instruction. The court had these affidavits before it and overruled the motion for a new trial, and this concludes the matter here.

It is argued the verdict of \$4100 is excessive. Plaintiffs' son was aged twelve years and five months at the time of his death. It appears that he was a strong, robust, healthy boy, and exceedingly alert and intelligent. He was attending school regularly and gave promise of a bright future. His father was a mender of china and glassware by trade, and the boy assisted him in his avocation, but the parents intended to avail themselves of educational advantages to his benefit. It is true the parents are not permitted to recover for the loss of the society of the boy, and, in the instant case, judgment was given solely on the grounds of the loss of service. But though such be true, we are unable to say that \$4100 is an excessive recovery, for no one can tell with any degree of precision that the earning capacity of such a boy be-

O'Brien v. Burroughs Adding Machine Co.

tween the ages of twelve years, five months and twenty-one years might not yield so much to the parents.

The judgment should be affirmed. It is so ordered.
Reynolds, P. J., and Allen, J., concur.

JAMES O'BRIEN et al., Respondents, v. BURROUGHS ADDING MACHINE COMPANY, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **MUNICIPAL CORPORATIONS: Injury to Pedestrian: Defect in Street: Liability of Property Owner.** It is generally true that, in the absence of legislative enactment, an abutting landowner is not liable to travellers for injuries received by them, through a defect in the street adjoining his premises, unless such defect was caused by his act or fault; but this rule does not apply, where the defect was an excavation extending across the lot into an alley, so as to be a nuisance.
2. ———: ———: **Nuisance Adjacent to Alley: Liability of Property Owner.** The owner of a lot, next to one on which a quarry was located, who permitted a chute, caused by the caving of the earth into the quarry, and which extended from the quarry across a corner of his lot and into a public alley, to remain unguarded, after notice of its existence, was liable, jointly with the owner of the quarry, for the death of a traveller in the alley, who fell into the quarry through the chute, since such a dangerous place was a nuisance, and the owner was liable for permitting it to continue, although he did not create it.
3. **NUISANCES: Liability for Maintenance.** Where one creates a nuisance on his premises, and passes it by deed or demise to another, who continues it there with knowledge, the person so continuing it is liable for resulting injuries, notwithstanding he did not create it.
4. ———: ———. Although the owner of property did not actually create a nuisance thereon, nevertheless if he continues to suffer it to exist on his premises, after notice, so that one rightfully about it as an invitee is injured because of it, he is liable for damages therefor.
5. **MUNICIPAL CORPORATIONS: Alleys: Rights of Pedestrians.** A public alley is a highway for all travel, and not merely for

the benefit of the adjoining lotowners, and a traveller injured thereon is an invitee, not a trespasser.

6. **DAMAGES: Instructions: Indefiniteness.** An instruction on the measure of damages, in an action for personal injuries, is not to be condemned on the ground that it is not specific, where it is correct in its general scope; especially where instructions given for defendant supply everything that is necessary and accurately declare the law on that subject.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings*, Judge.

AFFIRMED.

Buder & Buder for appellant.

(1) The alley in question was not a public highway. It was closed on both ends and only accessible by crossing private property. The deceased was in consequence a trespasser and he must take the premises as he finds them. The excavation, if any, on the property of this appellant was therefore not on or abutting a public highway, and this appellant owed the deceased no duty to protect him against such excavation. *Hunter v. Weston*, 111 Mo. 176; *Overholt v. Vieths*, 90 Mo. 422; 1 *Thompson on Negligence*, page 303; *Gillespie v. McGowan*, 100 Pa. St. 144; *Murphy v. City of Brooklyn*, 119 N. Y. 575; *Clark v. City of Richmond*, 83 Va. 355; *Straub v. Soderer*, 53 Mo. 42; *Kiley v. Kansas City*, 87 Mo. 103; *Butler v. Railroad*, 155 Mo. App. 296. (2) Alleys are not public highways for the common use of the traveling public. They are for the special use and particular benefit of the property in the block which abuts the alley and are intended to afford rear access to said property. Alleys are only intended for the use of the abutting property owners and those having business with them. *Elliott on Roads and Streets* (3 Ed.), sec. 29; *Corby v. Railroad*, 150 Mo. 468; *Naylor v. Harrisonville*, 207 Mo.

351; Dries v. St. Joseph, 98 Mo. App. 614; Faust v. Pope, 132 Mo. App. 294; Beecher v. People, 38 Mich. 289; Horton v. Williams, 99 Mich. 423; Paul v. Detroit, 32 Mich. 108; Bailey v. People, 43 Mich. 355; Face v. City of Ionia, 90 Mich. 104; Milliken v. Deavy, 135 N. C. 19. (3) It is the duty of the city to keep its sidewalks, alleys and streets in reasonably safe condition. But an abutting owner, as such, owes no such duty to the public to so maintain the sidewalks, streets and alleys abutting his premises, and he is not responsible for any defects therein which are not caused by his own wrongful act. Baustian v. Young *et al.* 152 Mo. 325; Norton v. St. Louis, 97 Mo. 537; St. Louis v. Insurance Company, 107 Mo. 92; Blackwell v. Hill, 76 Mo. App. 46; Independence v. Railroad, 86 Mo. App. 591; Elliott on Roads and Streets (3 Ed.), sec. 898; 28 Cyc. 1435. (4) An abutting owner is not liable for merely allowing a nuisance to exist on a public highway abutting his premises, provided he was not instrumental in creating it. This duty devolves entirely on the city, and it cannot evade, suspend or cast this duty upon others. Blackwell v. Hill, 76 Mo. App. 46; Norton v. St. Louis, 97 Mo. 537; St. Louis v. Insurance Company, 107 Mo. 92; Jelly v. Pieper, 44 Mo. App. 383; Kiley v. Kansas City, 87 Mo. 103; Russell v. Town of Columbia, 74 Mo. 480; Welsh v. St. Louis, 73 Mo. 71. (5) The verdict for \$4,100 is excessive, and cannot be sustained under any view of the evidence. Overholt v. Vieths, 93 Mo. 425; Calcaterra v. Iovaldi, 123 Mo. App. 347; Leahy v. Davis, 121 Mo. 221; Hickman v. Railroad, 22 Mo. App. 344; Franke v. St. Louis, 110 Mo. 516. (6) Instruction number 3, given for plaintiffs, is entirely too general in its terms and does not set out the proper measure of damages applicable to the case at bar. Parsons v. Railroad, 94 Mo. 296. (7) When the conduct or remarks of other counsel are prejudicial to the losing party, judgment will be reversed. An offer to have the jury view premises

was improper in this case. *Massengale v. Rice*, 94 Mo. App. 430; *Haynes v. Trenton*, 108 Mo. 123; *Brown v. Railroad*, 66 Mo. 58; *Ritter v. Bank*, 87 Mo. 574; *Rice-Stix & Co. v. Sally*, 176 Mo. 107; *Koch v. Hebel*, 32 Mo. App. 103; *McDonald v. Cash*, 45 Mo. App. 66; *Beck v. Railroad*, 129 Mo. App. 24; *Barnes v. St. Joseph*, 139 Mo. App. 545; *Thompson on Trials* (2 Ed.), secs. 881, 882.

Holland, Rutledge & Lashly for respondents.

See respondent's brief in *O'Brien v. Heman*, *ante*.

NORTONI, J.—For a full understanding of the facts pertaining to the questions in decision in this appeal of the Burroughs Adding Machine Company, reference is made to the statement accompanying the appeal of the Hemans, defendants, in the same case—that is, *James O'Brien, et al., v. August Heman et al.*, 191 Mo. App. 477, 177 S. W. 805 (decided today).

It is argued, first, that, as the defendant Burroughs Adding Machine Company did not create the nuisance—that is, the quarry—and is in no wise connected therewith but occupies the position merely of an adjoining proprietor, it is not liable to respond for the death of plaintiff's son. It is true this defendant is in no wise connected with the quarry in which plaintiffs' son came to his death. It is true, too, it did not create such nuisance. Neither did this defendant create the slide, or runway, into which plaintiffs' son stepped while walking in the alley and by means of which he was carried forward across the northwest corner of defendant's lot into the Heman quarry. Touching this it appears that the runway commenced in the public alley, probably seven or eight feet east of the northwest corner of the Heman property, on which the quarry was located, and probably eight or nine feet north of the lot line of this defendant. But the

runway or slide commencing at such point passed over the northwest corner of the lot owned by this defendant and into the quarry, for a portion of defendant's lot and also the alley had caved in. Adjoining proprietors north of the alley had thrown grass from their lawns into the mouth of the runway in the alley and thus concealed it. The little boy, passing the way immediately along the south side of the traveled road, stepped upon this new mown grass and disappeared at once, for he slid with the green grass, which gave way under his weight, instantly down the runway slide, from the point in the alley described, across the corner of defendant's lot, into the quarry of the Hemans.

The rule declared in *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921, to the effect that an abutting owner is under no primary duty to the public to mend an adjoining street is invoked and relied upon in support of the argument advanced, but we do not regard it relevant on the facts in judgment here. It is generally true, in the absence of legislative enactment on the subject, that an abutting land-owner is not liable to travelers for injuries received by them because of a defect in the street adjoining his premises, unless such defect was caused by the act or fault of such owner, as stated in 2 Elliott, *Roads and Streets* (3 Ed.), section 898. But this is true because the street is in the custody and keep of the municipality, and the abutting owner is not liable for its dereliction unless he contributed by affirmative act, in which event he is, of course, a joint *tortfeasor*. But the instant case presents something more than a mere defect in the street, for such defect was but the opening of a runway across the corner of the lot of defendant into the quarry, beside the highway. Obviously this runway, commencing in the alley and running across the northwest corner of defendant's lot for the distance probably of fifteen feet, was quite as dangerous as the

quarry itself and, therefore, constituted a nuisance on defendant's lot, adjacent and extending into the highway. This dangerous place defendant should have protected against by fence or wall or otherwise at its boundary line, or other convenient point, so as to prevent persons using the alley from being precipitated through it into the quarry.

This runaway, or slide, appears to have been caused by the action of the elements, aided, no doubt, by the continued dumping of ashes there for years on the part of the neighbors, and it is true this defendant did not participate in creating it, though it suffered it to exist, and this, too, after notice. The evidence of the police officer is, that he notified this defendant of the dangerous condition of the slide and suggested that precautionary measures be taken to protect against similar occurrences to that involved here, as much as a year before, when defendant's manager said he would look after it, or words to that effect.

No one can doubt that a dangerous place, such as this, if excavated by the abutting owner adjacent to the highway, so as to communicate from a point within the highway, would constitute a nuisance. The question then is: May it be regarded as a nuisance, in the circumstances of the case, so as to cast liability against defendant, it appearing defendant did not create it, though it knew it was there for more than a year before and neglected to make any provision for the protection of those using the public alley?

It is certain that if one creates a nuisance on his premises and passes it by deed or demise to another, who continues it there, with knowledge, the person continuing it, though he did not create it, is liable therefor. [See *Tate v. Missouri, K. & T. Ry. Co.*, 64 Mo. 149, 155; *McGowan v. Mo. Pac. R. Co.*, 23 Mo. App. 203; *Mancuso v. Kansas City*, 74 Mo. App. 138; *Hulett v. Missouri, K. & T. R. Co.*, 80 Mo. App. 87; *Joyce on Nuisances*, section 457.] And the rule is, that one may

be required to respond on account of a nuisance, though not erected by him, if it be upon his land, placed there by his predecessor in title, where it appears the owner had notice or knowledge of the existence of the nuisance. [See *Pinney v. Berry*, 61 Mo. 359.] Therefore, though it be that the owner of the property did not actually create the nuisance thereon, if he continues to suffer it to exist on his premises after notice, so that one rightfully about it, as an invitee on the premises, is injured because of it, such owner is liable in damages therefor. [See *Timlin v. Standard Oil Co.*, 126 N. Y. 514.] The principle, of course, is available and especially pertinent to one passing in the highway, who is injured because of a misstep, by being precipitated into a dangerous place so suffered, after due notice, to exist on the lot of an abutting proprietor.

But it is argued that an alley is not to be regarded as a public street, for such is designed to accommodate only the property holders in the block. The case of *Corby v. Chicago, R. I. etc. Ry. Co.*, 150 Mo. 457, 52 S. W. 282, is relied upon. In this case, the court employed language reflecting this thought, in determining an injunction suit by a property holder in the block, against the company, in which it was sought to restrain the construction of railroad tracks through the alley adjacent to his property. But obviously the doctrine of that case is not relevant here, when it is sought to be utilized to deny the right of a pedestrian to use a public alley as a public way, and render him a trespasser, in whose favor no duty to protect against the adjoining quarry obtained. In a case of this character, the public alley must be regarded as a highway and the person passing thereon as an invitee, rather than trespasser.

It is argued plaintiffs' instruction on the measure of damages is erroneous because not sufficiently specific. However, the instruction was sufficient, in its

general scope, as has been frequently decided. [See *Browning v. Wabash, etc. Ry.*, 124 Mo. 55, 27 S. W. 644; *State ex rel. United Rys. Co. v. Reynolds*, 257 Mo. 19, 165 S. W. 729; *Nelson v. United Rys. Co.*, 176 Mo. App. 423, 158 S. W. 446.]

Moreover, in this case defendant's instruction on the measure of damages supplied everything that was necessary and accurately declared the law on the subject.

The judgment should be affirmed. It is so ordered.
Reynolds, P. J., and *Allen, J.*, concur.

MAGGIE A. PARKER, Respondent, v. SUPREME
TENT, KNIGHTS OF THE MACCABEES OF
THE WORLD, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **TENDER: Sufficiency: Conditions.** In order for a tender to be availed of, it must be unconditional—that is, it must at least be unaccompanied by any condition to which the creditor has a right to object.
2. ———: ———: ———. If a debtor insist that the creditor admit that no more is due, in respect of the debt for which a tender is made, than the amount tendered, when the amount of the claim is in controversy, the tender is a conditional one and therefore ineffective.
3. ———: ———: ———: **Facts Stated.** Where a fraternal beneficiary association tendered to the beneficiary of a member who had committed suicide the amount due under the certificate, according to a provision of the by-laws, at a time when there was a difference between the decisions of two of the Courts of Appeals as to whether such limitation of liability was valid, on condition that the beneficiary agree to accept and receipt for the amount in full satisfaction of her claims under the certificate, there being no provision in the by-laws requiring a release in full, the tender was conditional, and hence did not stop the accrual of interest.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings*, Judge.

AFFIRMED.

R. P. & C. B. Williams for appellant.

Defendant tendered the correct amount due under the contract and had a right to annex as a condition to such tender that plaintiff would cancel the obligation evidenced by the certificate, and plaintiff's act in afterwards accepting the exact amount previously tendered and acknowledging that defendant was only liable for such amount at any time precludes the recovery of interest. *Engelbach v. Simpson*, 12 Tex. Civ. App. 188, 33 S. W. 596; *Bailey v. Buchanan*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562; *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482; *Loughborough v. McNevin*, 74 Cal. 250; *Storey v. Krewson*, 55 Ind. 297, 23 Am. Rep. 668; *Buffum v. Buffum*, 10 New Hamp. 457; *Haywood v. Hartshorn*, 55 New Hamp. 476; *Henderson v. Cass County*, 107 Mo. 56; *Johnson v. Cranage*, 45 Mich. 18; *Wheelock v. Tanner*, 39 N. Y. 486; *Man- kel v. Belscampe*, 84 Wis. 218; *Strofford v. Welch*, 59 N. H. 46; *Schaeffer v. Herman*, 85 A. 94, 237 Pa. 86.

Frank H. Haskins for respondent.

A tender in order to stop the running of interest must be unconditional. If coupled with a condition which the party making the tender has no right to demand, then the tender does not stop the running of interest, even though the party to whom tender is made afterwards accepts the exact amount tendered or even less than the amount tendered. A party making a tender cannot attach to the tender a condition that the amount tendered shall be accepted in full satisfaction of his claim. *Henderson v. Cass County*, 107 Mo. 56;

Ruppel v. S. & B. Co., 158 Mo. 622; West v. Farmers Mutual Ins. Co., 117 Iowa, 147; Richardson v. Boston Chemical Laboratory Co., 50 Mass. 42; Moore v. Norman, 52 Minn. 83; Plate Glass Co. v. Leary (S. D.), 126 N. W. 271; Mann v. Roberts, 126 Wis. 142; Roosevelt v. Bull Head's Bank, 45 Barb. 579; Sanford v. Buckley, 30 Conn. 344; Thayer v. Brackett, 12 Mass. 465; Wood v. Hitchcock, 20 Wend. 47; Tompkins v. Battie, 11 Neb. 147.

NORTONI, J.—This is a suit on a fraternal benefit certificate of life insurance. Plaintiff recovered and defendant prosecutes the appeal.

The right of recovery to the extent of \$583.20 is admitted, but plaintiff insists upon the right to have interest thereon in addition, at the rate of six per cent from November 12, 1908, and the controversy pertains alone to this matter.

Defendant tendered to plaintiff on November 12, 1908 the amount of \$583.20, upon condition that she agree to accept and receipt for the same in full of her claim under the certificate of insurance. This she declined to do, because, as then advised, she regarded her right to recover the amount of \$3000 on the certificate as reasonably clear. Thereafter, because of the decision of the Supreme Court in the case of *Armstrong v. Modern Brotherhood, etc.*, 245 Mo. 153, 149 S. W. 459, adverse to plaintiff's view of the law, she abandoned her claim for the full amount of \$3000 and accepted \$583.20 on the policy, but insisted upon her right to have interest thereon as well. It is urged on the part of defendant that the tender of \$583.20, of date November 12, 1908, prevented the accrual of interest thereafter, while plaintiff insists that such tender was not unconditionally made, in that it stipulated she should agree to accept and receipt for the same in full satisfaction of her claim under the certificate. The question in decision pertains to this matter alone. The

relevant facts are set forth in an agreed statement as follows:

“It is hereby stipulated by and between the parties to the above suit, that the following facts are agreed upon, to-wit:

“That on or about August, 1901, plaintiff was the wife of Wilbur F. Parker; that on said date Wilbur F. Parker became a member of the McKinley Tent No. 169, of the Order of the Knights of the Maccabees, and thereupon defendant issued to the said Wilbur F. Parker its benefit certificate No. 17172, which provided that upon the death of Wilbur F. Parker one assessment of the membership, not exceeding the sum of three thousand dollars would be paid as a benefit to his wife.

“That on or about July 1, 1908, Wilbur F. Parker died, being then a member of the said order, in good standing, and thereafter, in due time, plaintiff furnished defendant with proofs of death, and demanded payment of three thousand dollars, the same being less than one assessment on the membership.

“That on November 12, 1908, defendant refused to pay the said three thousand dollars, claiming that Wilbur F. Parker had committed suicide, and admitting that, even though Wilbur F. Parker had committed suicide, the sum of five hundred eighty-three dollars and twenty cents was due the plaintiff under said certificate, under and by virtue of a by-law of the defendant which was and is a part of the contract in question, as follows:

“ ‘Sec. 396. SUICIDE: No benefit shall be paid on account of the death of a member who shall die by his own hand, whether sane or insane; provided, however, that the beneficiary named in the life benefit certificate or the person legally entitled to the benefit shall receive an amount equal to twice the amount contributed to the Life Benefit Fund by the member during his lifetime.’

"It is admitted that the sum of \$583.20 is twice the amount contributed to the life benefit fund by Wilbur F. Parker during his lifetime. Defendant thereupon tendered plaintiff the sum of five hundred eighty-three dollars and twenty cents, upon condition that plaintiff agree to accept and receipt for same in full satisfaction of her claim under said certificate. Plaintiff refused to admit that Wilbur F. Parker committed suicide, and refused to accept said five hundred eighty-three dollars and twenty cents in full satisfaction of her claim under said certificate, and to release defendant from any further claim under said certificate.

"Thereafter, on November 17, 1908, this suit was filed. It is admitted that on the 1st day of September, 1911, plaintiff requested defendant to pay plaintiff the said sum of \$583.20, plaintiff stating that she would give defendant a receipt therefor, with the understanding that the payment and acceptance of such sum should not bind either party as to whether such payment was a complete settlement of the claim under the certificate, but defendant declined to accede to such request, and would consent to pay said sum only upon condition that plaintiff would receive and receipt for the same in full satisfaction of her claim under the certificate, which plaintiff declined to do.

"Thereafter, to-wit, on January 16, 1913, it was agreed between plaintiff and defendant that this suit be settled, plaintiff and defendant agreeing upon five hundred eighty-three dollars and twenty cents, as the amount originally due under said certificate (excluding interest, if any), and said amount was paid to plaintiff and plaintiff's receipt given to defendant, the parties agreeing that this court determine whether, under the above facts, plaintiff was entitled to interest on said sum.

"The theory upon which this case is to be tried is, that the said Wilbur F. Parker committed suicide on

or about July 1, 1908, and that under the contract and by-laws of the defendant the sum of \$583.20 became due to the plaintiff at the time of the filing of this suit, to-wit, November 12, 1908, and the only question for submission and decision is whether, under the above facts, the plaintiff is entitled to interest on the above sum.

“It is admitted that at the time of the filing of this suit plaintiff was relying on the decision in *Dennis v. Modern Brotherhood*, 119 Mo. App. 215, 95 S. W. 967, in the Kansas City Court of Appeals, which she claimed would entitle her to judgment regardless of the question of suicide; that subsequent to the filing of this suit a decision was handed down by the St. Louis Court of Appeals in the case of *Armstrong v. Modern Brotherhood*, 132 Mo. App. 171, 112 S. W. 24, which was in conflict with the aforesaid case, and that the case of *Armstrong v. Modern Brotherhood* was certified to the Supreme Court of Missouri and the finding of the St. Louis Court of Appeals was affirmed about October, 1912, setting aside the rule laid down in *Dennis v. Modern Brotherhood*. Both these cases may be referred to in argument either in the trial court or appellate court.

“If the court decides that on the above statement of facts plaintiff is entitled to interest, then judgment shall be rendered in favor of plaintiff for the amount of interest due, together with all costs. If the court decides that on the above statement of facts plaintiff is not entitled to interest, then judgment shall be rendered in favor of defendant, all costs accruing from and after this date shall be against plaintiff, the costs to this date having been paid by defendant.

“It is admitted that the defendant is a fraternal beneficiary association organized under the laws of the State of Michigan, and at all times herein mentioned

authorized to do business as such under the laws of the State of Missouri."

The court gave judgment for plaintiff in the amount of \$154.48 on account of interest accrued on the principal sum of \$583.20 from and after November 12, 1908, in the view that the tender then made was conditional.

There can be no doubt that, in order for a tender to be availed of, it must be unconditional—that is, it must at least be unaccompanied by any condition to which the creditor has a right to object. [See *Henderson v. Cass County*, 107 Mo. 50, 18 S. W. 992; see, also, 28 Am. & Eng. Ency. Law (2 Ed.), 31.]

The question is argued here by defendant as though the tender as made prescribed only that plaintiff should surrender the certificate of insurance and that such certificate provided for its surrender on the payment of the amount of \$583.20. If such be the fact, it does not appear in the case. The agreed statement of facts recites nothing with respect to the provisions of the insurance contract concerning this matter—that is, that defendant was entitled to have the certificate surrendered on the payment of the amount stated. On the contrary, the agreed statement reveals that a controversy was then on between the parties concerning the amount due plaintiff under the certificate, and touching the validity of this controversy the appellate courts of the State were not agreed. In this situation, while plaintiff was asserting a claim for \$3000 and defendant was insisting upon its right to liquidate the whole by the payment of \$583.20, the agreed statement recites that "Defendant thereupon tendered plaintiff the sum of five hundred eighty-three dollars and twenty cents upon condition that plaintiff agree to accept and receipt for same in full satisfaction of her claim under said certificate."

It is entirely clear that the tender so made was a conditional one in the circumstances stated, for defend-

ant annexed the express condition that plaintiff should accept and receipt for the same in full satisfaction of her claim under the certificate. The debtor may not insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made than the amount tendered, when the amount of the claim is in controversy. In such circumstances, if the tender is conditioned upon the creditor executing a receipt and release in full satisfaction, it is regarded as conditioned accordingly. [See *Henderson v. Cass County*, 107 Mo. 50, 56, 57, 18 S. W. 992; *Ruppel v. Missouri Guarantee, Savings & Bldg. Ass'n*, 158 Mo. 613, 622, 59 S. W. 1000.]

Touching this question, the author says, in 38 Cyc. 154, 155:

“A debtor cannot insist upon a receipt in full in respect to the particular claim upon which the tender is made, or a receipt in full for all demands, and if he does so he vitiates the tender; nor can the offer be made conditional upon the debtor receiving a discharge. A tender is held to be vitiated by coupling it with a demand for a receipt for the sum offered, unless, as is the case in a few jurisdictions, a statute exists which allows a demand for a receipt.”

However, even where the statute provides that a receipt may properly be demanded when a tender is made, the courts declare that such statute in nowise authorizes the annexation of the condition that such receipt should be in full satisfaction of the claim, when the amount is in dispute. [See *West v. Farmers' Mut. Ins. Co.*, 117 Iowa, 147, 90 N. W. 523.]

On the same question, the author, in 28 Am. & Eng. Ency. Law (2 Ed.), 33, thus states the law:

“In accordance with the rule stated in the next preceding section, the tender of a certain sum, on condition that the creditor will give a receipt in full, is not good, unless the release is especially stipulated for in the contract. A demand for a receipt in full invali-

dates a tender, even though it is provided by statute that a person making a tender may demand a receipt for the money tendered."

There is nothing in the agreed statement tending to show that a receipt in full or release was stipulated for in the contract, on the payment of \$583.20—that is, the amount tendered—and, therefore, defendant clearly annexed a condition to which plaintiff might properly object in requiring such to be executed on receiving the money. This being true, the tender appears to have been a conditional one and unavailing to stop the accrual of interest.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

L. H. KRALLMAN, Respondent, v. M. POTASHNICK, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **EVIDENCE: Rejection: Cumulative Evidence.** It is not error to reject evidence, where the fact it tends to prove is otherwise established and the adverse party admits it to be true.
2. **TRIAL PRACTICE: Remarks of Court: Invited Remarks.** Where, in examining plaintiff, defendant's counsel asked plaintiff if he did not know that he was bolstering up his case with something that was not true, in testifying to a certain matter, and the court sustained an objection to the question with the remark that this was taking advantage of the witness when he could not protect himself and that the question was therefore improper, *held* that the question, in the form propounded, was highly improper and embarrassing to the witness, and defendant, therefore, was in no position to complain of the stricture laid upon it by the court.
3. **SALES: Action for Purchase Price: Customs and Usages: Rejection of Evidence.** In an action by one commission merchant against another for the purchase price of string beans, plaintiff claimed that defendant purchased the beans unconditionally, knowing they were inferior in quality, for much less

Krallman v. Potashnick.

than the selling price of good beans, and that, after examining the beans contained in some of the hampers, he declined to make a further inspection. Defendant claimed that the purchase was by sample and that plaintiff agreed that the beans contained in the hampers not opened were of equal quality to those inspected. *Held*, that the court did not err in declining to complicate this issue by admitting evidence of a custom among commission men that goods purchased by sample might be returned if not equal to the sample.

4. ———: ———: Instructions. In an action by one commission merchant against another for the purchase price of string beans, plaintiff claimed that defendant purchased the beans unconditionally, knowing they were inferior in quality, for much less than the selling price of good beans, and that, after examining the beans contained in some of the hampers, he declined to make a further inspection. Defendant claimed that the purchase was by sample and that plaintiff agreed that the beans contained in the hampers not opened were of equal quality to those inspected. *Held*, that the issue involved was properly submitted by instructions to find for plaintiff, if defendant unconditionally purchased the beans at an agreed price, whether they were good or bad, and inspected a portion of them and declined to inspect the remainder, and to find for defendant, if the beans were sold on condition that they were all to be in as good condition as those contained in the hampers that were opened and examined and if those in the hampers not opened were not in as good condition as those that were examined.
5. ———: ———: Evidence: Admissions. In an action by one commission merchant against another for the purchase price of string beans, plaintiff claimed that defendant purchased the beans unconditionally, knowing they were inferior in quality, for much less than the selling price of good beans, and that, after examining the beans contained in some of the hampers, he declined to make a further inspection. Defendant claimed that the purchase was by sample and that plaintiff agreed that the beans contained in the hampers not opened were of equal quality to those inspected. Plaintiff, on cross-examination, stated that if the beans were rotten, he would not expect any person to pay for them. *Held*, that this was not, as claimed by defendant, an admission on his part that the contract was not as he stated it was, but, considered in connection with all of his testimony, amounted to nothing more than an admission that if *all* of the beans were rotten, he would not expect payment.

Appeal from St. Louis City Circuit Court.—*Hon.*
Daniel D. Fisher, Judge.

AFFIRMED.

James M. Rollins, Burr S. Goodman and Joseph Reilly for appellant.

(1) The evidence in this case shows that there was a mutual mistake. The plaintiff at the time of sale, according to his own testimony, "wouldn't expect any person to pay for the beans if they were rotten when sold." The defendant thought he was buying beans fit for human food, as, unless they were fit for human food, they were worthless for any purpose. In an action on a promissory note for a horse worthless for any purpose there is a total failure of the consideration; and the fact that defendant has made partial payments on the note does not estop him from pleading failure of consideration. *Danforth v. Crookshanks*, 68 Mo. App. 311. (2) In a suit by payee upon a note given for goods sold, the maker may show in a defense of failure of consideration, that the goods were not as described and warranted at the sale, or that they were worthless for the purposes for which they were sold. *Murphy v. Gay*, 37 Mo. 536; *Brown v. Weldon*, 99 Mo. 564. In *Lee v. Sickles Saddlery Co.*, 38 Mo. App. page 206, J. Biggs quotes from Lord Ellenborough: "When there is no opportunity to inspect the commodity, the maxim *caveat emptor* does not apply. . . . The purchaser cannot be supposed to buy goods to lay them on a dung hill." *Lee v. Sickles*, 38 Mo. App. 201. (3) Goods sold for the ordinary price and for a particular purpose known to the vendor carry an implied warranty that they are reasonably fit for the use intended and if not so fit the vendee may return them to the vendor, thereby rescinding the sale or keep the same and defeat recovery of the purchase price to the extent of the difference between the value if the goods had been of the quality contracted for and their real value in their inferior condi-

tion. St. Louis Brewing Association v. McEnroe, 80 Mo. App. 429.

Frank A. C. MacManus for respondent.

NORTONI, J.—This is a suit for the purchase price of some string beans. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

It appears that both plaintiff and defendant are commission merchants in St. Louis, and the matter in controversy pertains to the purchase of sixty hampers of beans at \$1 per hamper. The evidence tends to prove that plaintiff had received a consignment of string beans from the south, sixty hampers in all. It is said that a hamper is a wooden receptacle with a closed top fastened by a clamp. At the time defendant approached plaintiff's place of business, several hampers of beans were standing on the sidewalk with the lids removed, while the major portion were still on the express wagon, not having been unloaded therefrom. According to plaintiff's evidence, defendant examined the beans contained in six or eight hampers so resting on the sidewalk and proposed to buy the lot. Plaintiff says standard string beans were worth about \$2 to \$2.25 per hamper at the time, but these being of inferior quality, defendant offered him \$1 per hamper for the lot, and declined to make a further inspection thereof.

The theory of the case presented by plaintiff and portrayed in his evidence is, that both parties knew the beans were of inferior quality. They were neighboring commission merchants on the street and familiar with such commodities. Plaintiff says that defendant, knowing the beans to be of inferior quality and having examined some six or eight hampers that were open said: "I don't want to see any more; I will give you a dollar a hamper for the lot; that is the very

words he said." He accepted this offer, in the view that it was an unconditional one, whether the beans were good, bad or indifferent—that is, as if plaintiff were to take them notwithstanding their condition. Defendant, on the other hand, insists that he purchased the beans as by sample—that is to say, he examined four hampers, according to his evidence, which were then opened, and it was agreed that those contained in the unopened hampers on the wagon should be of the same quality. Concerning this, defendant testified: "That the beans should be as represented, as that few hampers we looked at; the balance should be as good as what we seen."

After purchasing the beans, defendant moved them to his store and upon examining the lot found that all of them, save some four or five hampers, were water soaked, and almost all of them rotten, so as to be unfit for food. Thereupon, he sent all back to plaintiff's store, excepting four hampers, which he sold, and for these he tendered \$5. Plaintiff declined to accept the tender of \$5 and likewise an offer of \$10 for a release and also declined to accept the return of the beans, insisting that defendant purchased them for better or worse, as they should appear to be. Plaintiff notified the city authorities and it appears an officer of the health department visited his store during the afternoon and condemned all of the remaining fifty-six hampers of beans as unfit for food. After having condemned the beans, the officer poured coal oil upon them, as is the practice, in order to prevent their possible sale in the market thereafter.

The evidence excludes the idea of an implied warranty that the goods were fit for use, in that the express contract of purchase shows either an unconditional sale, or one by sample with an express warranty.

The court submitted the issue to the jury on the part of plaintiff under an instruction substantially

to the effect that if it found defendant unconditionally purchased the beans—that is, whether good or bad—at the agreed price, and actually inspected a portion of them and declined to inspect the remainder, then he was liable for such purchase price, notwithstanding the condition the beans were in.

On the part of defendant, the court submitted the question according to his version of the contract of purchase under the following instruction:

“If the jury find from all the evidence that the beans in question were sold to defendant on condition that they were all to be in as good condition as the beans contained in certain hampers that it is admitted were opened and examined, and if you further find from the evidence that the beans in the hampers that were not opened were not in as good condition as those in the hampers that were opened and examined, you will find for the defendant, except as to the five dollars tendered into court, and in any event you will find in favor of plaintiff for \$5.”

Under these instructions the jury found the issue, as before stated, for plaintiff for the amount of the purchase price.

It is argued the court erred in excluding evidence offered by defendant to the effect that the beans, all save four hampers, were condemned by the city authorities as unfit for food; also that it erred in excluding the report of the inspector of the health department thereon. Obviously there is no error in this, for the record abounds with evidence to the same effect, and, indeed, plaintiff in his testimony admitted that he knew the beans were condemned as unfit after the purchase, and actually destroyed by the city authorities. The evidence thus excluded is only cumulative on a matter which seems not to have been controverted—that is, that fifty-six hampers of beans were condemned and destroyed.

Defendant's counsel propounded a question to plaintiff while he was on the stand and to it the court sustained an objection. The question and the ruling of the court thereon were as follows: "Don't you know that you are now bolstering up your case with something that is not true, when you say that the defendant said, 'I don't want to see any more?'" The court sustained the objection to this question with the remark that this is taking advantage of the witness on the stand when he cannot protect himself and the question is, therefore, improper. It is argued this ruling and comment of the court was prejudicial. The question, in the form propounded, was highly improper and embarrassing to the witness, to say the least. Defendant may, therefore, not complain of the stricture laid upon it by the court in the ruling given.

Defendant sought to prove a custom among the commission men to the effect that, when a purchase was made between them on sample, if the goods not examined turned out to be below the standard exhibited as a sample, they were returned and credit given accordingly. The court excluded this evidence and it is argued that error inheres in the ruling. If it were conceded in the case that the sale was made by sample, it may be the ruling of the court would be subject to the criticism levied against it, but here the issue was sharply drawn as to the character of the contract of purchase, and this being true, it cannot be said the court erred in the ruling complained of. Plaintiff affirmed that the beans were purchased by defendant as inferior in quality, unconditionally, at a dollar per hamper for the lot, when the selling price of good beans was \$2 to \$2.25 per hamper, and that plaintiff declined further inspection proposing to take them as they were, notwithstanding what the condition of those not examined by him might turn out to be. On the other hand, defendant insisted the purchase was by sample, in that plaintiff agreed the beans

contained in the hampers not opened were of like quality with those he inspected. This being the true issue for the determination of the jury, it cannot be said that the court erred in declining to complicate it by the admission of evidence of a custom which prevailed with respect to transactions involving sales admitted to be made by sample. The true issue in the case—that is, as to the character of the contract of purchase—was submitted well enough by the instructions of the court given on behalf of plaintiff and defendant above referred to.

There is evidence tending to prove that the beans were not all rotten, but that some of them in all of the hampers were, and, therefore, the lot was regarded as second or third in quality. It is said some of the beans in the hampers that plaintiff examined were rotten too. In plaintiff's cross-examination he said at one place, "No sir; I didn't; if the beans were rotten I would not expect any person to pay for the beans." It is earnestly insisted that this amounts to an admission on his part that the contract of purchase was not as he testified—that is, that plaintiff was to take them at one dollar per hamper notwithstanding their quality. But this answer must be read in connection with all the testimony of the same witness, and, as before said, there is an abundance of evidence that the beans were not all rotten. At least four hampers are admitted to have been of fair quality, and it is said there were good and bad beans commingled throughout all the others. This being true, the admission amounts to no more than if all of the beans were rotten then defendant would not expect payment, and it sufficiently appears that both parties knew some of them were and some were not. The question of liability in the case turns on the character of the contract of purchase and that was properly submitted by the instructions given.

The court did not err in refusing the instructions requested by defendant, for the reason that they do not appear to require a finding by the jury with respect to the true issue—that is, as to what the parties intended at the time the contract of sale was entered into.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

HENRY KRIBS, Appellant, v. UNITED ORDER OF FORESTERS, Respondent.

St. Louis Court of Appeals, June 8, 1915.

1. **WITNESSES: Impeachment: Proof of Indictment Without Conviction Incompetent.** Although under Sec. 6383, R. S. 1909, the fact that a witness has been convicted of a criminal offense may be shown to affect his credibility, it is not competent to show that he has merely been charged with an offense by an indictment, information, or otherwise, for, until conviction, he is presumptively innocent and, *prima facie*, of good repute.
2. ———: ———: ———. The error in overruling an objection to a question, on cross-examination of the plaintiff in a civil action, as to whether he had been indicted for a felony, was not rendered harmless by his answer, that he had “knocked out” the indictment twice and that the case against him had not been tried, since it did not show that he had been acquitted of the charge.
3. **LIFE INSURANCE: Assessment Plan: Fraternal Beneficiary Associations: Misrepresentations.** Sections 6937 and 6986, R. S. 1909, which provide that no misrepresentation made in obtaining a life insurance policy shall be deemed material or render the policy void, unless the matter misrepresented actually contributes to the death, relate to insurance contracts entered into on the stipulated premium plan only, and the doctrine of warranty, which, prior to the enactment of these statutes, applied to insurance contracts of all kinds, still applies to insurance on the assessment plan, or fraternal in character, and, in either case, the law exacts literal compliance with the warranty, rather than mere substantial compliance, which suffices in the case of representations.

Kribs v. United Order of Foresters.

4. ———: ———: **Misrepresentations: Statements Written by Insurer's Agent.** Where an applicant for insurance on the assessment plan signed the application on the representation that the physician of insurer, who examined him, would fill in the blanks, statements subsequently written in the application by the physician could not be treated as a warranty by insured, so as to avoid the insurance, upon such statements proving to be false, unless the application accompanied the policy and insured retained it with knowledge of the false statements.
5. ———: ———: ———: ———: **Instructions.** In an action on a life insurance policy on the assessment plan, defended on the ground that insured had made misrepresentations in his application, where there was evidence on behalf of plaintiff that insured signed the application on the representation that the physician of insurer, who examined him, would fill in the blanks, that the physician inserted the answers that were claimed to be false by defendant, and that the application did not accompany the policy and insured had no knowledge of the false statements that were made, an instruction, given for defendant, which instructed a verdict for defendant if insured signed the application and the statements therein made were untrue, was erroneous, for the reason that it ignored plaintiff's evidence concerning the acts of defendant's physician.
6. ———: ———: ———: **Rejection of Applicant by "Association."** A statement that an applicant for life insurance on the assessment plan had never been rejected by any "physician, company or association" is shown to be false by proof that a fraternal beneficiary association or its physician had rejected the applicant; the word "association" including fraternal beneficiary associations and other organizations of like character.
7. ———: ———: **Fraternal Beneficiary Associations: Character of Insurance: Method of Determining.** Whether a life insurance contract provides for insurance on the assessment plan or evidences a contract which is subject to the laws relating to fraternal beneficiary associations depends, not on the nature of the order issuing the contract, but on the terms and character of the contract, although the order was licensed to conduct business as a fraternal beneficiary association prior to the issuance of the contract.
8. ———: ———: ———: **Character of Insurance: Facts Stated.** The by-laws of a fraternal insurance order, possessing a representative form of government, a lodge system and ritualistic work, and conducting an insurance business by levying fixed monthly assessments and dues going into a common fund, declared that members taking term certificates should pay monthly for each \$1000 benefit the amount shown by a table, and authorized special assessments to pay all claims against

Kribs v. United Order of Foresters.

the fund, and provided that the beneficiary of each term member should participate in the fund to the extent of the net amount realized from one assessment on all of its term members, not exceeding the amount named in the benefit certificate, but if there is sufficient money in the fund, the executive council may, in its discretion, pay the amount named in the certificate. The order, which was admitted to do business in this State as a fraternal beneficiary association, issued a certificate in this State, binding it to pay, at the death of the member, the net amount realized by the order in its term insurance fund from one assessment on all members, not exceeding a specified sum. *Held*, that the insurance was on the assessment plan, under Sec. 6950, R. S. 1909, and that, under Sec. 6952, the beneficiary could recover the face of the policy, instead of the amount of one assessment; section 6962, exempting fraternal beneficiary associations, not being applicable.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED AND REMANDED.

Joseph A. Wright and *Conard Paeben* for appellant.

(1) The court erred in permitting counsel for defendant to interrogate and prove by the plaintiff, over the objection of his counsel, that he had been indicted for arson. An indictment is not evidence of guilt, and such evidence was prejudicial to plaintiff. Sec. 6383, R. S. 1909; *State v. Wigger*, 196 Mo. 90; *State v. Hess*, 240 Mo. 160; *State v. Weisman*, 238 Mo. 557; *State v. Phillips*, 233 Mo. 306; *State v. Leever*, 171 Mo. App. 376. (2) The answer alleged that William T. Kribs made an untrue statement in his application to the effect that he had never been rejected for insurance when he previously "had made application for insurance to the Modern Woodmen, a fraternal insurance association, and had been rejected by said Modern Woodmen." Rejection by a fraternal order is not rejection for life insurance, and the allegations pleaded constitute no defense. The court

erred in overruling plaintiff's motion to strike out parts of the answer and in admitting evidence of his prior rejection by the Modern Woodmen. *Westerman v. Knights of Pythias*, 196 Mo. 670; *Tice v. Knights of Pythias*, 204 Mo. 349; *Modern Woodmen of America v. Angle*, 127 Mo. App. 94; *McDermott v. Modern Woodmen of America*, 97 Mo. App. 636; *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466; *Penn Mutual Life Ins. Co. v. Bank and Trust Co.*, 72 Fed. 419; *Mutual Life Insurance Co. v. Ford (Tex.)*, 130 S. W. 769; *Wright v. Fraternities Health and Accident Assn.*, 107 Me. 418, 21 L. R. A. (N. S.) 461; 78 Atl. 475. (3) The questions were propounded by the defendant and it would seem a just and proper rule to adopt that ambiguity should be resolved against the defendant. If it had wished clear and explicit answers, the questions could have been easily and readily framed. *Rogers v. Modern Brotherhood of America*, 131 Mo. App. 353; *Roark v. City Trust and Surety Co.*, 130 Mo. App. 401; *Claver v. Woodmen of the World*, 152 Mo. App. 155; *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466; *Penn Mutual Ins. Co. v. Merchants Savings Bank & Trust Co.*, 72 Fed. 419, 38 L. R. A. 33; *Mutual Life Ins. Co. v. Ford (Tex.)*, 130 S. W. 760; *Darrow v. Mamly Fund Society*, 116 N. Y. 537, 6 L. R. A. 495. (4) The application shows deceased applied for \$3000 insurance and the laws of defendant designate the contract one for insurance. Whatever doubts might arise should be resolved in favor of the plaintiff in determining the amount due on the contract. *Laker v. Royal Fraternal Union*, 95 Mo. App. 353; *Hall v. Royal Fraternal Union*, 130 Ga. 820, 61 S. E. 917; 1 Cooley's Brief on Insurance, 688. (5) The publication made monthly by defendant in the official order, *United Forester*, with bold letters announcing a large surplus to protect its contracts, and sent to all the members, is an admission of defendant that it has and

had at all times sufficient funds to pay the term insurance contracts in full. Defendant cannot now limit its liability to \$380.60 on a \$3,000 contract and thereby profit by its own fraud and wrong. Instruction number 2 offered by defendant instructing the jury that if they found one assessment equaled only \$380.60, they should find for defendant was clearly erroneous. The court should have given the second refused instruction asked by plaintiff. *Wabash Valley Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919; *Laker v. Royal Fraternal Union*, 95 Mo. App. 353; *Easter v. Brotherhood of American Yeomen*, 154 Mo. App. 456; *Craig v. Western Life Insurance Co.*, 136 Mo. App. 5; *Hall v. Royal Fraternal Union*, 130 Ga. 820, 61 S. E. 919; 4 *Cooley's Brief on Insurance*, 3283-4; *Phillips v. St. Louis & San Francisco R. Co.*, 211 Mo. 419. (6) Instructions numbers 5, 6 and 7, offered by defendant, are erroneous; rejection by the *Modern Woodmen of America* was not rejection for life insurance. Cases cited under point 2. (7) Instructions numbers 5, 6 and 7, given for defendant, are erroneous for a further reason. These instructions ignore entirely the evidence that deceased did not read over the application and that Dr. Waterhouse, the examining physician, filled in certain answers after William T. Kribs left his office. *Modern Woodmen of America v. Angle*, 127 Mo. Apt. 94, 111; *Jones v. Prudential Insurance Co.*, 173 Mo. App. 1; *Ormsby v. Laclede Farmers, etc., Ins. Co.*, 105 Mo. App. 143; *Suravitz v. Prudential Insurance Co.*, 244 Pa. 582, L. R. A. 1915a; *Lyon v. United Moderns*, 148 Cal. 470, 4 L. R. A. (N. S.) 247; 3 *Cooley's Brief on Insurance*, 2555-2561; 2 *Bacon on Benefit Societies* (3 Ed.), sec. 458. (8) Contracts for death benefits are properly classified by the courts of Missouri, having regard to the statutory provisions, as follows: (a) Regular life insurance, (b) insurance on the assessment plan, (c) benefits in fraternal beneficiary societies. *State ex rel. v. Van-*

diver, 213 Mo. 187; Westerman v. Knights of Pythias, 196 Mo. 670; Aloe v. Fidelity Mutual Life Assn., 164 Mo. 675; Toomey v. Knights of Pythias, 147 Mo. 129; Tice v. Knights of Pythias, 123 Mo. App. 85; Morton v. Royal Tribe of Joseph, 83 Mo. App. 78. (9) The contract existing between defendant and deceased was insurance on the assessment plan, under Art. III, Ch. 61, Secs. 6950-6952, inclusive, R. S. 1909. Whenever a benefit accrues under a contract of insurance, "the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan." Sec. 6950, R. S. 1909; Elliott v. Des Moines Life Ins. Co., 163 Mo. 132; Hanford v. Mass. Benefit Assn., 122 Mo. 50; Moran v. Franklin Life Ins. Co., 160 Mo. App. 407; Easter v. Brotherhood of American Yeomen, 154 Mo. App. 456; Smoot v. Bankers Life Assn., 138 Mo. App. 438; Goodson v. National Masonic Accident Assn., 91 Mo. App. 339; Knott v. Security Mutual Life Ins. Co. (K. C. Court of Appeals), 144 S. W. 178; Hayden v. Franklin Life Ins. Co., 136 Fed. 285; Mutual Reserve Life Ins. Co. v. Roth, 122 Fed. 853; Haydel v. Mutual Reserve Fund Life Assn., 104 Fed. 718. (10) The contract being for insurance on the assessment plan, by Sec. 6952, R. S. 1909, the certificate "shall specify the exact sum of money it promises to pay upon each contingency insured against." Therefore, upon death of William T. Kribs, \$3000, became due and payable. McFarland v. U. S. Accident Assn., 124 Mo. 204; Hanford v. Mass. Benefit Assn., 122 Mo. 50; Elliott v. Des Moines Life Ins. Co., 163 Mo. 132; Matthews v. Modern Woodmen of America, 236; Mo. 326, 351; Easter v. Brotherhood of American Yeomen, 154 Mo. App. 456; Goodson v. National Masonic Accident Assn., 91 Mo. App. 339; Courtney v. Fidelity Mutual

Aid Assn., 120 Mo. App. 110; Kroge v. Modern Brotherhood, 126 Mo. App. 693.

Douglas W. Robert for respondent.

(1) (a) The defendant is a fraternal organization conducting its business on the lodge system, with representative form of government, with ritualistic form of work, and limiting its certificate holders to its own members, and provides for the relief of its members' families, widows, orphans and kindred dependents from the proceeds of assessments upon its members. Hence the statutes relating to assessment companies do not apply to it. R. S. 1909, secs. 6962, 7109-7121. (b) The undisputed evidence shows that it is "organized and carried on for the sole benefit of its members and not for profit;" that it has "a lodge system, with ritualistic form of work and representative form of government;" that it provides that "death benefits shall be to the families, heirs, blood relatives, affianced husband or wife, or to persons dependent upon the member." R. S. 1909, sec. 7109. (2) (a) The agreement making the answers warranties is valid. If the answers are false, it is a good defense, for the warranty must be literally true. *McDermott v. Woodmen*, 97 Mo. App. 636; *Aloe v. Insurance Co.*, 164 Mo. 675; *Aloe v. Insurance Co.*, 147 Mo. 571; *Whitmore v. K. & L. of H.*, 100 Mo. 36. (b) Deceased's answer in the application to the defendant that his mother died in confinement was false. Deceased's answer that he did not have consumption was false. Deceased's answer that he had never been rejected for insurance by a physician or association was false. (c) There was no conflict in the evidence. Anyway, that was for the jury, and plaintiff is attempting to change his theory here. Authorities under point 7. (3) (a) Kribs had applied for "insurance;" an examining physician had declined to recommend him

Kribs v. United Order of Foresters.

for "insurance," and he had been rejected for "insurance" by an "association," all of the Modern Woodmen. Deceased's application to the Modern Woodmen was for "insurance." Benefit certificates in fraternal orders are "insurance." *Lewine v. Knights of Pythias*, 142 Mo. App. 547. (b) There was no ambiguity in the application. The questions were plain, straightforward and simple. The applicant was asked if he had ever been rejected "by any physician, company or association." *Peterson v. Insurance Co.*, 244 Ill. 329; *Alden v. Maccabees*, 178 N. Y. 535; *Bruce v. Insurance Co.*, 74 Minn. 310. (4) As the plaintiff filed a reply to the answer after his motion to strike out was overruled, he waived any right to complain of such action of the court. *Kansas City v. Youman*, 213 Mo. 176; *Kansas City v. Surety Co.*, 196 Mo. 300; *Springfield Co. v. Donovan*, 147 Mo. 628; *Anderson v. Railroad*, 129 Mo. App. 384; *Durham v. City of Bolivar*, 106 Mo. App. 384. (5) (a) There was a total failure of proof. Plaintiff sued upon contracts by which, he alleged, the defendant "agreed that upon the death of said William Kribs, * * * to pay the said beneficiaries the sum of one thousand dollars." The contracts offered in evidence contained no such provision. In them defendant agreed to pay, under certain conditions, "the net amount realized by said order in its term insurance fund from one assessment" upon like members, "but not exceeding the sum of one thousand dollars." And the evidence showed but \$380.60 was realized from one assessment. A party cannot sue upon one contract and recover upon another. *Burke v. Pence*, 206 Mo. 335; *Ingerson v. Railroad*, 205 Mo. 337; *Timber Co. v. Railroad*, 180 Mo. 420-466; *Reed v. Bott*, 100 Mo. 62; *Myers v. Railroad*, 120 Mo. App. 288; *Goodwin v. Fritsch*, 115 Mo. App. 382; *Edelen v. Strong*, 34 Mo. App. 295; R. S. 1909, sec. 2021. (b) The application, the certificate and the by-laws formed the contract. *Richmond v. Supreme Lodge*, 100 Mo.

App. 19; Laker v. Royal Union, 95 Mo. App. 353; Slater v. K. & L. H., 76 Mo. App. 387; Sheele v. Lodge, 63 Mo. App. 277; State ex rel v. Benev. Soc., 42 Mo. App. 488. (6) The statutes relating to assessment companies, Secs. 6950 to 6961, R. S. 1909, do not apply to fraternal companies. They are exempted in express language. Sec. 6962, R. S. 1909. (7) The case was tried below on the theory that defendant was a fraternal beneficiary association, and plaintiff offered instructions on that theory. He cannot change his theory on appeal. Meyer Bros. Drug Co. v. Bybee, 179 Mo. 379; Swearingen v. Ins. Co., 66 Mo. App. 93; Birge v. Bock, 44 Mo. App. 80; Novelty Mfg. Co. v. Pratt, 21 Mo. App. 173. (8) There was no fraud in the publication of the summary of all funds in its hands. Plaintiff's own evidence shows that the same publication contained the exact amount of the term insurance fund. Nor is there any showing that the deceased ever saw this paper or was influenced thereby. No fraud of any kind is charged in the petition. (9) There was no error in the court's requiring the defendant to answer the question, "Are you the same Henry J. Kribs under indictment for arson in this city?" The question was asked for the sole purpose of identification. There was no reason given for the objection made by plaintiff's counsel. Plaintiff's counsel went fully into the matter in redirect examination, and plaintiff explained that he had "knocked out" the indictment twice, "it was thrown out of court," and that he was never tried. The error, if any, was therefore harmless. State v. Howard, 102 Mo. 142-148; Travis v. Insurance Co., 47 Mo. App. 482-486.

NORTONI, J.—This is a suit on three separate certificates of life insurance. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

It appears that the insured, William T. Kribs, applied to defendant for insurance on his life in the amount of \$3000, and subsequently affiliated with the order on or about the first day of November, 1908. At that time defendant issued to the insured three several term benefit certificates, Nos. 41, 41A and 41B. Henry J. Kribs and Lizzie Gibson, uncle and aunt of insured, are designated as the beneficiaries. His application for the insurance was approved, and on the first day of November, 1908, defendant issued to the insured the three certificates of insurance sued upon. Each certificate is in words and figures alike, save one is denominated as No. 41, while the second is No. 41A, and the third No. 41B. In each and all of the certificates defendant agrees to pay to the beneficiaries therein named—that is, Henry Kribs, and Lizzie Gibson—on the death of the insured, “the net amount realized by said order in its term insurance fund from one assessment upon all its members holding limited term benefit certificates on its natural premium plan, but not exceeding the sum of one thousand dollars, less such sums, if any, as may have been paid to such member on account of disability benefits.” The insured paid all of the assessments accruing on account of the insurance until the date of his death, which occurred on February 18, 1910. But defendant declined to pay more than \$380—that is, the amount of one assessment, as a total under the three certificates—, and thereupon Lizzie Gibson assigned her interest under the certificates to her brother, Henry J. Kribs, the plaintiff, and this suit was instituted by him.

The petition proceeds in three counts, one declaring upon each separate certificate of insurance, and avers that such certificates are contracts of life insurance issued by defendant, whereby it was bound to pay plaintiff the full sum of \$1000 on each.

By its answer, defendant asserts it is a fraternal beneficiary association; also that, in no event, is plaintiff entitled to recover more than the amount of one assessment on all of the members holding similar contracts of term insurance, which, it is said, is but \$380; and, moreover, that the several certificates are void because of certain false statements made by the insured on procuring their issue, which said statements were parcel of the consideration and especially agreed between the parties to be warranties of fact. All of these matters are expressly denied in the reply.

There is a question made in the case as to the character of insurance stipulated in the certificates sued upon, for plaintiff asserts that, though defendant may be a fraternal order, the insurance here involved is insurance on the assessment plan, and, under the statute, it is required to pay the specified sum mentioned in the policy—that is \$1000 on each certificate; whereas defendant insists the contracts are merely fraternal beneficiary certificates and the amount to be paid thereunder is limited by competent provisions. However, as the defense of breach of warranty is available in a suit on either a policy issued on the assessment plan or a fraternal beneficiary certificate, the question concerning the character of the insurance contract will be postponed for consideration in the opinion, until other matters pressed upon us are treated with.

The first argument advanced for a reversal of the judgment relates to the propriety of a question propounded and answer elicited from the plaintiff by defendant in the cross-examination. On opening its cross-examination of plaintiff, defendant's counsel propounded the following question to him: "Q. Are you the same Henry J. Kribs under indictment for arson in this city?" To this question plaintiff objected, because an indictment is not evidence of guilt, but this the court overruled, and exception was duly saved.

Thereupon plaintiff answered that he was the same Henry J. Kribs under indictment, and subsequently explained that he had "knocked it out twice," but the case had not been tried. It is clear the court erred in permitting this question and answer in the circumstances stated, and the fact that plaintiff had succeeded in "knocking out" the indictment twice in nowise relieves the situation, for it does not appear that he had been acquitted of the charge. Although by our statute (section 6383, R. S. 1909) the conviction of a person who offers himself as a witness may be shown in evidence to affect his credibility, it is not competent to show that he has merely been charged with an offense as by indictment, information or otherwise, for, until conviction, he enjoys the presumption of innocence and of good repute, *prima facie*, as others do. The Supreme Court has expressly so ruled the question in judgment here, as will appear by reference to *State v. Wigger*, 196 Mo. 90, 98, 100, 93 S. W. 390, and it is unnecessary to enlarge upon it.

The application for the insurance and the certificates issued thereon recite that the answers to the questions given in such application are in all respects true and stipulate warranties to that effect, so as to render the insurance contracts void in event the facts are not in all respects wholly true as stated. Touching this matter our statute, to the effect that such statements shall be regarded merely as representations, and abrogating the doctrine of warranty, unless it appear the fact misrepresented is material to the risk, in that it pertained to a matter which subsequently contributed to the death of the insured, is beside the case, for the rule there prescribed, perforce of other statutes, relates alone to insurance contracts entered into on the stipulated premium plan. In other words, if the contracts in judgment here are of insurance on the assessment plan, the doctrine of warranty in insurance law which obtained prior to the statute may be

invoked to avoid the insurance, in event the statements of facts which induced it are found to be untrue and the warranty thereby breached. [*Aloe v. Mut. Reserve Ass'n*, 147 Mo. 561, 49 S. W. 553; *Aloe v. Fidelity Mut. Life Ass'n*, 164 Mo. 675, 55 S. W. 993.] The same is true, too, with respect to contracts of insurance which are fraternal in character, and, in either case, the law exacts literal compliance with the warranty, rather than mere substantial compliance, which will suffice in the case of representations. [See *McDermott v. Modern Woodmen*, 97 Mo. App. 636, 71 S. W. 833.]

However, it appears here that the insured died from consumption, and the statements of fact contained in the application touching his own condition of health at the time are such as to render them material, even under the statute. But this is beside the instant case. In the application for the insurance involved here the following questions and answers appear over the signature of the insured:

"Have you ever had any of the following diseases or ailments? 28. Consumption? No. 52. I have had no disease or ailment, except as above or hereafter stated . . . 65. Have you ever applied for life insurance? No. 66. No examining physician has ever declined to recommend me for life insurance, except . . . 67. I have never been rejected for insurance by any physician, company or association, nor suspended or expelled by your Order, except . . ."

The application then recites:

"79. The following is a true statement of the age, if living, condition of health, age at death, cause of death, how long sick and previous health of my father, mother, brothers, sisters and grandparents, to-wit: Mother—Age at death, 36; cause of death, in confinement; previous health, good. 80. None of my grandparents, uncles, aunts or near relations have been afflicted with consumption"—all of which statements are warranted to be true.

There is evidence in the record tending to prove that insured was afflicted with consumption for several months before he executed the application above mentioned and that he had been advised by a physician to remove to Arizona on that account. There is evidence, also, that the statement as to the death of his mother—the cause being given as in confinement—was untrue and that she died of consumption about 1890. It appears, too, that insured applied for life insurance a short time before to the Modern Woodmen of America, a fraternal beneficiary society, and that he stated in such application that his mother had died of consumption. This application was introduced in evidence, and, likewise, the evidence of several physicians connected with the Modern Woodmen was given to the effect that his application for insurance and membership in that association was rejected because of the statement pertaining to the death of his mother.

But there is evidence, too, on the part of plaintiff, Henry Kribs, uncle of the insured, who was present at the time the application for insurance to this defendant was made, that the insured did not answer the questions above referred to. The evidence of this witness goes to the effect that defendant's medical examiner, Dr. Waterhouse, examined the insured carefully and asked him a number of questions, but, upon coming to these questions, the doctor referred to them as a lot of "tomfoolishness," and said he would later fill in the answers to them. So saying, he directed the insured to sign the application with such questions unanswered, which was done. Dr. Waterhouse testifies that each and all of the questions in the application were propounded to the insured personally and that the answer was written by him therein precisely as given by the insured.

In submitting the matter of breach of warranty to the jury on the part of defendant, the court apparently did not reckon with the evidence of plaintiff,

who, it is said, was present when the application was signed, and testified that the insured made no statements whatever touching the matters above referred to. Defendant's instructions go to the effect that if the jury believed the insured signed the application, then he warranted the statements therein to be true, and that, if they believed the assured was afflicted at the time with consumption, or that his mother had theretofore died of consumption, or any other disease than because of confinement, or that the insured had applied for life insurance and been rejected by any other association, the verdict should be for defendant. These instructions are erroneous, in that they authorize a verdict for defendant on the mere fact of the insured signing the application, whether he acceded to the statements therein contained or not. In other words, the instructions on the part of defendant omit entirely to reckon with the evidence of the insured's uncle, plaintiff, who accompanied him at the time the application was filled out and signed, for this witness said that the insured was not even required by Dr. Waterhouse, defendant's physician, who acted for it thereabout, to make any statements concerning these matters. As to these, plaintiff testifies Dr. Waterhouse said it related to a lot of "tomfoolishness," which he would fill in subsequently, without reading them to the insured, and that insured, therefore, did not read them himself. If such be true, then, though the statements or answers subsequently written by Dr. Waterhouse, or by some one other than the insured, over the signature of the insured, appear to be untrue in point of fact, their untruthfulness may not be regarded or utilized as a breach of warranty so as to avoid the insurance on that account.

While the insured is held to account for such statements and warranties as he makes, this is not true when it appears the statements were not laid before him, so as to obtain his assent thereto, or that the

answers were written by defendant's physician, while acting for it. In such circumstances, the insurer is estopped by the act of its physician to assert that insured consented thereto by merely signing the application at the instance of the physician, leaving such blanks to be subsequently filled. [See *Modern Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 297; *Ormsby v. Laclede Farmers' Mut. etc. Ins. Co.*, 105 Mo. App. 143, 79 S. W. 733. See, also, 3, *Cooley's Briefs on Insurance*, 2561.] The same doctrine obtains as to insurance agents. [See 3 *Cooley's Briefs on Insurance*, 2555, 2556.] The exception to this rule is in those cases where the application accompanies the policy and it appears the insured retained it with full knowledge of the false answers therein contained. In the instant case, the application was retained by the company and neither it nor a copy was annexed to the certificates of insurance, and there is nothing to suggest that the insured knew of any false statements in the application, provided they were made by Dr. Waterhouse after he signed it, as plaintiff's testimony tends to show.

Defendant's instructions were erroneous because they authorized a verdict for defendant on the mere signing of the application by the insured, without regard as to whether he or Dr. Waterhouse was responsible for the false statements of fact contained therein.

It is argued the court erred in receiving in evidence the application made by the insured to the Modern Woodmen of America, a fraternal order or association, a short time before, as evidence tending to prove that he had made a false statement to defendant in the application here, to the effect that he had never been rejected for insurance by any physician, company or association. But we are not so persuaded. The application made to defendant and before us here recites:

"67. I have never been rejected for insurance by any physician, company or association, nor suspended or expelled by your Order, except . . ."

The argument is, that an application addressed to a fraternal society, such as the Modern Woodmen, for a certificate of insurance on life therein, is in no sense an application for life insurance and, therefore, the court erred in receiving the one theretofore made to that order and on which the insured was rejected as not a desirable insurable risk. It is unnecessary to consider this matter in the instant case further than to say that the warranty of fact before us goes to the effect that the insured "had never been rejected for life insurance by any physician, company or association." It is entirely clear that if it be found as a fact that he was rejected by the physicians of the Modern Woodmen of America, on application to that order for insurance on his life, such would reveal a breach of the warranty set forth, if we are to give effect as we must, to plain English words.

It is certain that the case of *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466, relied upon touching this matter is not in point, for there the breach of warranty asserted was that the insured stated in his application he had never been declined by any other insurance "company," whereas it appears he had been so declined as a desirable insurable risk by the Modern Woodmen, a fraternal society. It was said that, under the strict construction which obtains in the law of warranty under insurance contracts, a fraternal society does not fall within the meaning of the word insurance "company." However, even that case recognizes the distinction well established, where it appears the insured has answered that he has not been declined by any company or "association."

Here the covenant is, that the insured had never been rejected for insurance by any physician, company

or association. Whatever the doctrine may be elsewhere, this court has on several occasions heretofore declared that such contracts as those involved here are essentially contracts of insurance on the life involved. [See *Lewine v. Knights of Pythias*, 122 Mo. App. 547, 99 S. W. 821; *Morton v. Sup. Council, etc.*, 100 Mo. App. 76, 90, 73 S. W. 259.] Therefore, if it appear to the satisfaction of the jury that the insured had been rejected for insurance by the physicians of the Modern Woodmen of America or by that association, this showing will suffice as a breach of warranty on the facts before us. Indeed, in matters of this character the courts declare that the word "association" employed in the application for insurance is sufficiently comprehensive to include fraternal benefit societies and other organizations of like character. [See *Alden v. Maccabees*, 178 N. Y. 535; *Bruce v. Ins. Co.*, 74 Minn. 310.] And the case of *Peterson v. Manhattan Life Ins. Co.*, supra, expressly recognizes such to be true.

It is insisted on the part of plaintiff that the contracts of insurance involved here vouchsafe insurance on the assessment plan, so as to entitle him to recover, if at all, the full amount mentioned in the certificates, while defendant urges that the certificates are fraternal in character. It is to be conceded that defendant is a fraternal organization and organized as such under the laws of Wisconsin. Its constitution and by-laws reveal the general structure of the society to be one possessing a representative form of government, a lodge system and ritualistic work, conducting an insurance business by levying fixed monthly assessments, and dues on members, which amounts go into a common fund. But it possesses also another feature distinct from this, which will be subsequently adverted to. It appears, too, that it was admitted to do business in this State as a fraternal society under our statute, on January 6, 1902. The three certificates in suit here were issued several years after that date—that is, Novem-

ber 1, 1908. But though such be true, the question made is not to be determined by the construction and purport as to the internal organization of the order, but rather by reference to the particular contracts of insurance involved, for, though an order may be fraternal in character, it sometimes occurs that another field is invaded by the form and effect of the contract of insurance issued. It is therefore said that it is not the nature of the order but rather the terms and character of the contract that determine the matter. [State ex rel. Sup. Lodge K. of P. v. Vandiver, 213 Mo. 187, 111 S. W. 911; 15 Am. & Eng. Ann. Cas, 283; Toomey v. Sup. Lodge K. of P., 147 Mo. 129, 48 S. W. 936; McPike v. Supreme Ruling, etc., 187 Mo. App. 679, 173 S. W. 71; Wilson v. Gen. Assembly, etc., 125 Mo. App. 597, 103 S. W. 109.] And this is true, too, though it appears defendant was licensed to conduct the business of fraternal insurance in this State prior to the issue of the contracts in suit. [See Herzberg v. Mod. Brotherhood, 110 Mo. App. 328, 85 S. W. 986.]

In considering this question, it will be necessary to set forth so much of one of the certificates in suit as is material, and it will speak for all, as each of the others are identical, save only the serial number. We copy, too, relevant portions of the by-laws pertaining to the character of the insurance contemplated under these certificates, for the by-laws are aptly referred to as part of the contracts throughout the certificates. However, it should first be said that it appears defendant, though conducting a fraternal insurance business on the whole life plan, erected within the order a special feature known as limited term insurance on its natural premium plan, and the certificates here involved are of the latter class. The by-laws authorize such certificates and provide a scheme with respect to them and their payment independent of the whole life fraternal insurance offered by the order. So much

of certificate No. 41 as is relevant here, issued as a limited term certificate of insurance, on the natural premium plan, is as follows:

"No. 41	Benefit Certificate	\$1000
	United	
	Order of Foresters.	
	(Seal)	

"This certifies that William T. Kribs, of St. Louis, Mo., has been admitted by the United Order of Foresters (a fraternal benefit order, organized and existing as a corporation under the laws of the State of Wisconsin) as an insured member thereof, on its natural premium plan, and is entitled to such rights and benefits, and is subject to such obligations and forfeitures, as are or may be in such case provided from time to time in the laws, rules and regulations of said Order, and among such benefits, said Order *will pay*, at the death of said member while in good standing, to Henry Kribs two-thirds and Lizzie Gibson 1-3, bearing relationship to said member of uncle and aunt, *the net amount realized by said Order in its term insurance fund from one assessment upon all its members holding limited term benefit certificates on its natural premium plan*, but not exceeding the sum of one thousand dollars less such sums, if any, as may have been paid to such member on account of disability benefits upon receipt of such proof of death as the executive council may require with the surrender of this certificate."

We have italicized some of the words of the certificate with a view of inviting special attention thereto. The sections of the by-laws of the order which are relevant for immediate consideration in this connection are to be found in law 8 of the order.

"Sec. 4. Natural Premium Rates.—Members taking term certificates shall pay monthly for each one thousand dollars benefit according to their attained

ages, occupations and amount of insurance, the amounts shown in the following table:

MONTHLY RATE FOR \$1000 BENEFIT
NATURAL PREMIUM PLAN.

Age	Ordinary Occupa- tions.	Hazardous Occupa- tions.	Specially Hazardous Occupa- tions.
18 to 25	\$.67	\$.77	\$.87
25 to 30	.71	.81	.91
30 to 35	.73	.83	.93
35 to 40	.79	.89	.99
40 to 45	.90	1.00	1.10
45 to 50	1.07	1.17	1.27

“Provided, that in case the mortality experience of the Order shall be less than that shown by the National Fraternal Congress Table of Mortality, then the executive council shall have authority to remit a monthly payment in whole or in part, from time to time, so as to make the payments in this plan to conform to the actual mortality experience of the Order.”

“Section 8. Special Term Assessments.—Whenever in the opinion of the executive council the amount of money in the term insurance fund is not sufficient to promptly pay all claims against said fund, said council shall levy one or more assessments against each member holding a term benefit certificate according to the rate provided for such members in the laws of the Order. All special assessments made on the term members shall become due and payable on the first day of the calendar month next following the month in which the notice of such assessment shall have been published.”

“Section 10.—The beneficiary of each term member shall be entitled to participate in the term insurance fund of the Order to the extent of the net amount

realized by the Order from one assessment upon all of its term members, but not exceeding the amount named in the benefit certificate of such member; provided, that if there be sufficient money in the term insurance fund for that purpose, then the executive council may in its discretion pay the full amount named in the certificate."

It appears to be clear enough that the contract of insurance set forth in the certificates, the payment of which is authorized and provided for by these by-laws, is one on the assessment plan under our statute. The statute (section 7901, R. S. 1899) was in force when these certificates were issued and long prior thereto and ever since that time. [See same statute, section 6950, R. S. 1909.] By this statute it is declared that every contract whereby a benefit is to accrue to a person or persons named therein upon the death of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and each contract shall be subject to the provisions of the succeeding sections touching such insurance. It is said the controlling principle of the statute is, that the benefit is to be paid out of a fund raised by assessment upon other persons holding similar contracts, by which they are made liable for the payment of such assessments. Assessment insurance is to be distinguished by reference to the right on the part of the insured to require others holding similar contracts to pay an assessment levied against them to compensate a benefit accrued to him or his beneficiary thereunder, and by reference, too, to the power which is reserved or resides in the insurer to levy assessments upon and require the payments from persons holding similar contracts to pay such benefits as may accrue under

the terms of like contracts held by others. This being true, it is, therefore, true as well that if the payment of the benefit vouchsafed depends in any manner or degree under a contract assuring the right and power above mentioned, the insurance is on the assessment plan, because of the express terms of our statute. [See *Jacobs v. Life Ass'n*, 146 Mo. 523, 48 S. W. 462; *Williams v. Ins. Co.*, 189 Mo. 70, 87 S. W. 499; *Hanford v. Massachusetts, etc. Ass'n*, 122 Mo. 50, 26 S. W. 680; *Moran v. Franklin Life Ins. Co.*, 160 Mo. App. 407, 140 S. W. 955; *Elliott v. Des Moines Life Ass'n*, 163 Mo. 132, 63 S. W. 400; *Smoot v. Bankers' Life Ass'n*, 138 Mo. App. 438, 120 S. W. 719.]

Here, the certificate of insurance on its face reveals a contract of life insurance on the assessment plan, for it recites that the order will pay "the net amount realized by said Order in its term insurance fund from one assessment upon all its members holding limited term benefit certificates on its natural premium plan, but not exceeding the same of \$1000." This provision obviously assures to those entitled to the benefit a right to have an assessment made with a view of compensating such benefit, and this assessment is to be made against members holding similar contracts. Such being true, the correlative duty obtains on the part of the defendant to make the assessment accordingly against the holder of every similar contract, with a view of compensating the benefit accrued under these. But the face of the certificates are modified as to this by section 4 of the Law 8, which fixes the amount to be assessed at a certain prescribed amount monthly, and if this were all, it may be the insurance would be other than assessment in character. But when the by-laws above set out are considered together, all of which are parcel of the contract of insurance, it appears defendant expressly reserved the power to make assessments over and above the fixed monthly stipend, and in certain contingencies the in-

sured could insist on this too. It is true section number 4 authorizes the executive council of the order to remit a monthly assessment in whole or in part, if it should appear, according to the mortality experience therein contemplated, that it was not required in certain contingencies. It is true, too, that section number 10, in keeping with the language of the certificate, says that each term member shall be entitled to participate in the term insurance fund of the order, to the extent of the net amount realized by the order from one assessment upon all of its term members, not exceeding the amount named in the certificate. But this is modified by a proviso, to the effect that if there be sufficient money in the term insurance fund for that purpose, the executive council may, in its discretion, pay the full amount named in the certificate. Then, too, section 8 authorizes the executive council, whenever in its opinion the amount of money in the term insurance fund is not sufficient to promptly pay all claims against that fund, to levy one or more assessments against each member holding a term benefit certificate, according to the rate provided for such members in the laws of the order. This reveals a reservation of power on the part of the defendant to make one or more assessments against each member holding similar certificates, when necessary to provide means to meet the demands on benefits then accrued.

When it is remembered that, under the provisions of section 4, the insured is required to pay monthly, say, in this case, as the member was only twenty-four years of age at the time of negotiating the insurance, an assessment of sixty-seven cents on each \$1000 certificate and \$2.01 on the three certificates per month, the provision of sections 8 and 10, considered together, would render him and every other holder of similar contracts liable to an additional assessment, whenever, in the opinion of the executive council, such was necessary, as therein recited.

This additional assessment, so provided for, which casts the duty upon the insured and others to pay and confers power on the order to levy it, obviously renders the contracts those of assessment insurance in the view of the Supreme Court declared in *Hanford v. Ins. Co.*, 122 Mo. 50, 26 S. W. 680, even though the monthly payment of sixty-seven cents per \$1000 or \$2.01 on the \$3000 should be regarded as a fixed premium to that extent. [*Hayden v. Franklin Life Ins. Co.*, 136 Fed. 285.] In this respect the instant case is to be distinguished from those of *Williams v. Ins. Co.*, 189 Mo. 70, 87 S. W. 499 and *Aloe v. Ins. Co.*, 164 Mo. 675, 55 S. W. 993, for, in each of those cases, it is said that, though a power was reserved to raise additional funds—in the one to supply the equation fund, and in the other a mortuary fund—in neither did the amount defendant contracted to pay depend in whole or in part upon the collection of the assessment. The contracts there involved stipulated the payment of a certain sum in event of the death of the insured. Here, the amount to be paid depends, under the terms of the by-laws and the certificates, in a manner or degree upon such additional assessment, for if, in exercising its discretion, the executive council depletes the mortuary fund and other benefits mature in the meantime, such council is not only given express power, but by-law, section 8, requires that said council shall levy one or more additional assessments against each member holding a term benefit certificate, according to the rate provided for such member in the laws, to compensate such benefit so accrued in the interim.

Thus it is that the amount to be paid on these certificates held by the insured, after treating the monthly payments as stipulated premium, depend, in a manner or degree, when the discretion of the executive council is considered, on assessments made on other persons holding similar contracts. Obviously, under sections 8 and 10 of by-law 8, when considered

together, the monthly payments provided for in section 4 are not unalterably fixed, for they may be varied on the exercise of the discretion of the executive council.

The rule is well established that insurance is to be regarded as on the assessment plan when the payments are not unalterably fixed by the contract, other elements under our statute above pointed out appearing. When such elements are present and the payments to be made are stipulated in a manner, so as to destroy their character as unalterable and certain, and to introduce the element of uncertainty by variation, as by levying other and additional assessments in the discretion of the insurer, the assessment feature appears. [*Hadel v. Mut. Reserve*, 98 Fed. 200; *Knott v. Security, etc., Life Ins. Co.*, 161 Mo. App. 579, 592, 144 S. W. 178; *Moran v. Franklin Life Ins. Co.*, 160 Mo. App. 407, 140 S. W. 955.]

It appearing that the insurance contracts involved here are on the assessment plan, the statute expressly requires they specify the exact amount of money which they promise to pay, and this statute becomes parcel of the contracts on issuing the certificates in this State as was done here. In this view, it is immaterial that the certificates recite, and the by-law too, for that matter, that the sum to be paid under each is the amount of one assessment upon persons holding similar contracts not exceeding \$1000, for the statute fixes the amount and requires it to be specified in each contract. [*See McFarland v. United States, etc. Accident Ass'n*, 124 Mo. 204, 220, 221, 27 S. W. 436.] The same thought is expressed in *Hanford v. Massachusetts Ben. Ass'n*, *supra*. It, therefore appears that if plaintiff prevails, he is entitled to recover \$1000 and interest on each certificate, rather than \$380, the amount of one assessment, as asserted by defendant, on the three.

Section 7913, Revised Statute 1899 (same section 6962, R. S. 1909) exempting fraternal societies from the operation of the statutes on assessment insurance, invoked by defendant in argument is without influence here, for that the contract of insurance involved is not such as a fraternal benefit society is authorized to enter into, but rather one on the assessment plan.

The judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.* and *Allen, J.*, concur.

ALBERT L. REEVES, Appellant, v. FRANK J. LUTZ, Respondent.

St. Louis Court of Appeals, June 8, 1915.

1. **PHYSICIANS AND SURGEONS: Malpractice: Evidence.** In an action against a surgeon for injuries to plaintiff's wife from a hot water bag, used to sustain her vitality during an operation, there was evidence that burns sometimes unavoidably occur through the moving of the patient while the anaesthetic is being administered, even though the utmost care is used, and there was also evidence that, except as stated, it was not proper practice to permit the patient to be burned. The court asked expert witnesses whether patients were frequently burned in such operations and whether there was danger of burning, and, when objection was made by plaintiff's counsel, on the ground that it was not competent to show that burns may have occurred in other instances, as the surgeons in such cases may have been careless, the court remarked that he did not know that his question was well framed, but that he had undertaken to get at the general experience of surgeons of skill and ability in operations of this kind. The witnesses answered that such burns did occur, and that there was such danger. *Held*, that these questions and answers were prejudicial, especially in connection with the court's explanation and in connection with the instructions, in which the court repeatedly charged, in different phraseology, that defendant was only required to exercise such care as an ordinarily skillful and careful surgeon was accustomed to exercise, since they did not discriminate between a case where a burn might have been inflicted through careless-

Reeves v. Lutz.

ness from one where the burn occurred, although due care was used, through an unexpected movement of the patient during the operation.

2. **INSTRUCTIONS: Repetition.** The repetition of the same proposition of law in a number of instructions is to be condemned, even though the proposition is correctly stated.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

REVERSED AND REMANDED.

Douglas W. Robert for appellant.

(1) The charge of negligence is not refuted by evidence that the best of surgeons are sometimes negligent. *Reeves v. Lutz*, 179 Mo. App. 61; *Samuels v. Willis*, 133 Ky. 459; *Davis v. Kerr* (Pa.), 86 Atl. 1007. (2) (a) It is erroneous to give undue prominence to evidence by repetition of instructions. *Cytron v. Transit Co.*, 205 Mo. 718; *State v. McKinzie*, 102 Mo. 629; *Sidway v. Livestock Co.*, 163 Mo. 376; *Johnson v. Traction Co.*, 176 Mo. App. 183. (b) It was therefore error to repeat the same theory in instructions numbers 4, 5, 6 and 7, and thus repeat the instruction four times. (3) (a) Instructions cannot be broader than the pleading and facts, nor should they submit matters not supported by evidence. *Scrivner v. Railroad*, 169 S. W. 85; *Degonia v. Railroad*, 224 Mo. 589; *Crow v. Railroad*, 212 Mo. 611; *Robertson v. Railroad*, 152 Mo. 382; *Waddingham v. Hulett*, 92 Mo. 528; *Vanhooser v. Berghoff*, 90 Mo. 499; *Mansur v. Botts*, 80 Mo. 658; *Price v. Railroad*, 77 Mo. 508; *Bank v. Murdock*, 62 Mo. 70; *Ludwig v. Cooperage Co.*, 156 Mo. App. 128; *Crumley v. Timber Co.*, 144 Mo. App. 536; *Marr v. Bunker*, 92 Mo. App. 651; *Day v. Railroad*, 81 Mo. App. 471. (b) Instruction number 3 is erroneous in that it misdirected the jury as to the complaint in the petition. (c) Instruction number 4 is

erroneous in that it told the jury that "if defendant exercised and used such skill and care in said operation and in the preparation therefor and in the use of the hot water bags mentioned in the evidence" as other skilled surgeons used in the locality plaintiff could not recover. There was no evidence of such use in the case. (d) Instructions numbers 3 and 8 are erroneous in that they told the jury "that this (the necessity or propriety of the operation) was decided and determined upon by the plaintiff and his wife before she came to plaintiff (*sic*) for the operation" and that it was "admitted that without consulting the defendant, plaintiff and his wife had determined upon performing the operation which was performed in this case." There was no such issue and no such evidence in the case. (e) Instruction number 7 is erroneous in that the question of "testing the heat of the" hot water bags is referred to and submitted to the jury. (f) Instruction number 7 is further erroneous in that it refers to Dr. Lutz's actions as "a mere error of judgment." There was no such issue or evidence in the case. (g) Instruction number 8 is also erroneous in that it refers to loss of services, society and company resulting from Mrs. Reeves' cancerous condition when there was no evidence of that. (h) It was error to refuse instruction number 11, and to give it in the modified form and refer to the operation for cancer. (4) Evidence of an operation subsequent to the filing of the suit was clearly inadmissible. *Holladay v. Moss*, 79 Mo. App. 548; *Newcomb v. Railroad*, 182 Mo. 715; *Olmstead v. Brown*, 12 Barb. (N. Y.) 657.

Morton Jourdan and *John Cashman* for respondent.

There was no error committed in allowing the doctors to explain their answers to the questions put to

each of them by plaintiff's counsel in substantially the following form: "Q. And that would not be proper surgery, would it?" (to burn the patient's leg). In view of this question, to allow the answer which must be necessarily given by all of the doctors to go unexplained would be just what Dr. Carson said it would be. "The Witness: Such an answer needs explanation; and the only way to get the correct idea is to give an explanation. To answer that without explanation would be wrong." *Hogan v. Railroad*, 150 Mo. 51. Even if it is held to be error, which it is not, still it is not such as to reverse this case. *Hogan v. Railroad*, 150 Mo. 51; *Gordon v. Evans*, 97 Mo. 603; *Julian v. Calkins*, 85 Mo. 202; *Bank v. Wells*, 98 Mo. App. 573; *Walker v. Cooper*, 97 Mo. App. 441; *O'Keefe v. Railroad*, 124 Mo. App. 613. The testimony of the doctors complained about by plaintiff was admissible upon another theory: It was expert testimony, and these doctors had a right to give their opinions in regard to the effect of certain courses of treatment or precautions practiced and taken during the course of the operation. *Hogan v. Railroad*, 150 Mo. 51; *Railroad v. Railroad*, 110 Mo. App. 300.

NORTONI, J.—This is a suit for damages said to have accrued on account of defendant's negligence. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

Defendant is a physician and surgeon, and the charge laid against him relates to an alleged malpractice. Plaintiff's wife was suffering from a cancer on her breast and he employed defendant to remove it through a surgical operation.

The petition is in two counts, but, on a former trial, a recovery was had by plaintiff on the second count, while defendant prevailed on the first. We reviewed the case here and approved the finding for plaintiff on the second count, but remanded it for fur-

ther proceedings on the first. The present appeal presents the issue tried on the first count of the petition only.

For an extensive statement of the facts of the case, see the opinion on the former appeal, *Reeves v. Lutz*, 179 Mo. App. 61, 162 S. W. 280, to which reference is made.

In performing the surgical operation, it was necessary to employ hot water bags about the patient, in order to sustain her vitality during the while. The evidence is, that defendant personally adjusted the hot water bag between the lower limbs of the patient, immediately before commencing the operation, and that this was permitted to remain there without examination for as much as an hour and a half or two hours, for the operation, which was an extensive one, consumed so much time. As a result, one of the lower limbs of plaintiff's wife was severely burned, so as to entail such suffering upon her as to render her incapable of performing the usual duties of a housewife, affording the usual comfort and aid and society to her husband for a considerable time.

It appears that the hot water bag was filled with water, almost, if not quite, to boiling heat, and all the evidence is, that it was a proper practice employed by the most enlightened members of the profession in this locality to use such hot water bags in like circumstances. The hot water bag was wrapped with a towel, and the patient was clad with a cotton flannel garment to protect the skin at the time, and such, too, was the usual practice. However, it appears the patient had varicose veins in the limb burned, and the evidence is, that such renders one more liable to burn than if not so afflicted; moreover, defendant knew of this condition and of the likelihood to enhanced susceptibility to burns from that cause.

After the hot water bag was placed between the limbs of the patient, she was covered with a sheet, and

then with two blankets and another, said to be a sterile sheet, in order to retain the heat, with a view of sustaining vitality. There is evidence that sometimes such burns unavoidably occur, through the kicking or moving of the patient while the anaesthetic is being administered, even though the utmost care is used. And there is evidence, too, by way of cross-examination, that, except as stated, it is not proper practice to permit the patient to be burned. There is evidence here that the patient moved and kicked some, but no examination was made during the entire time as to whether the hot water bottle was disturbed in its position so as to injure her during the time.

It appears that the court, over the objection and exception of plaintiff's counsel, permitted several expert witnesses to testify on behalf of defendant that burns are frequently inflicted on patients during the operation. The questions so propounded and to which answers favorable to defendant were elicited are as follows:

On examination of Dr. McCandless, the court propounded the following question to him, over the objection and exception of plaintiff: "In your own experience, and that which you have had with other surgeons, doctor, have you noticed whether patients have been frequently, or otherwise, burned in such operations, by hot water bottles?" The doctor answered that such burns do occur.

Then, too, over the objection and exception of plaintiff's counsel, the court propounded to Dr. Carson the following question: "Has it been your experience, and that of other surgeons, that there was danger at times of burning the patient with hot water bottles?" The doctor answered: "Yes, sir."

These questions were objected to on the ground that it was not competent to show that such burns may have occurred in other instances, for such surgeons may have been careless and the matter in issue was

as to whether defendant exercised the proper measure of care and skill in the particular case. After the objection so made was pressed, the court said: "I don't know that my question was very well framed, but I have undertaken, in support of the idea that underlies it, to get at the general experience of surgeons of skill and ability in operations of this kind, with respect to the burning of patients while under the knife," and thereupon directed that the questions be answered.

It is clear these questions and answers, and especially when considered in connection with the explanation of the court, were prejudicial, for they in nowise discriminated the case where a burn might have been inflicted through carelessness, in which event liability to respond therefor would appear, from one which occurred when ordinary care was exercised by a skillful surgeon, as through unexpected movement of the patient during the operation, which caused the burn and, therefore, could not have been obviated by due care, and on account of which no liability may be entailed. The proposition was touched upon in the former appeal, for we there asserted substantially that the mere fact that all surgeons may be careless at times does not relieve another from performing his duties with due care in the particular case. [Reeves v. Lutz, 179 Mo. App. 61, 162 S. W. 280; Samuels v. Willis, 133 Ky. 459, 118 S. W. 339; Davis v. Kerr, 239 Pa. 351, 86 Atl., 1007.]

Especially were these questions and answers prejudicial in the instant case when the several instructions given on the part of defendant are considered in connection therewith. Four separate instructions given for defendant iterated and reiterated the same proposition of law to the jury, though in different phraseology, to the effect that defendant was only required to exercise reasonable care—that is, such as an ordinarily skillful and careful surgeon is accustomed to exercise in like surgical operations under similar

circumstances in the same locality—and that he should be acquitted of fault if he did this. The proposition of law is well enough, but when coming from the court repeatedly in instructions on evidence tending to show that all surgeons frequently burned their patients in like cases it would seem to mislead the jury into believing that defendant could not be required to respond, though remiss in the particular case, for his conduct is to be measured only by what such average physicians and surgeons usually do. The instructions referred to in full are as follows:

IV.

“The court instructs the jury that the employment of defendant, Dr. Lutz, to perform the surgical operation mentioned in the evidence on plaintiff’s wife, was not for the exercise of extraordinary skill and care by defendant in the matter of said operation and preparation therefor, and the use and application of the hot water bag mentioned in the evidence; defendant was only required to exercise reasonable skill and care, that is, such skill and care as an ordinarily skillful and careful surgeon is accustomed to exercise and use in like surgical operations, under like circumstances; and, if defendant exercised and used such skill and care in said operation and in the preparation therefor, and in the use of the hot water bag mentioned in the evidence, then, the plaintiff cannot recover, although during the performance of said operation the wife of the plaintiff was burned by the hot water bag, mentioned in the evidence, which caused the injuries out of which this suit grows.”

V.

“The court instructs the jury that the fact that the limb of the plaintiff’s wife was burned by the use of the hot water bag will not authorize a recovery upon the part of the plaintiff in this case, if the jury find and believe from the evidence that in the use and

application of said hot water bag, mentioned in the evidence, Dr. Lutz exercised the skill and care of an ordinarily skillful and careful surgeon in the use and application of said hot water bag, taking into consideration the character of the operation and all the attending circumstances."

VI.

"You are instructed that if you find and believe from the evidence that in the use and application of the hot water bag mentioned in the evidence, and from the use of which the limb of plaintiff's wife was burned, Dr. Lutz exercised the skill and care in the use and application of said hot water bag that an ordinarily skillful and careful surgeon, taking into consideration the character of the operation and all the attending circumstances, would have used, then, the plaintiff is not entitled to recover in this case and your verdict will be for the defendant."

VII.

"The court instructs the jury that although you may believe from the evidence that the defendant used hot water bags while performing the operation on plaintiff's wife, and that she was burned by one of said bags, yet if you further believe from the evidence that the use of hot water bags in aid of operations such as defendant performed in this instance had been and was generally approved, and such hot water bags generally used in like operations by surgeons in the locality where this operation was performed, and that the hot water bags used by defendant were recognized by surgeons generally as of the adopted and standard make, and were prepared for use, and used and applied in the way that surgeons generally adopted and approved in that locality, and that in filling said hot

water bags and in testing the heat of the same, and in preparing the same for application and in the application thereof the defendant exercised reasonable care and skill, that is, such reasonable care and skill as was commonly and generally used and exercised by surgeons generally in the locality where the operation was performed, and that defendant possessed such skill in all of the matters above mentioned, as was possessed by the general average of surgeons in the locality where he practiced, and that in all of said matters above mentioned, he exercised his best judgment, then the court instructs you that defendant cannot be held liable for damages for a mere error of judgment, and your verdict must be for defendant."

Such repetition alone is to be condemned. [Sidway v. Mo. etc. Co., 163 Mo. 342, 376, 63 S. W. 705; Johnson v. Traction Co., 176 Mo. App. 174, 161 S. W. 1193.]

Because of the questions and answers above set forth and the instructions so forcefully utilizing the benefit derived from this evidence, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

NIGHT & DAY BANK, Appellant, v. LAZARUS
ROSENBAUM, Respondent.

St. Louis Court of Appeals, June 8, 1915.

1. **BILLS AND NOTES: "Accommodation Party:" Primary Liability.** An "accommodation party," defined by Sec. 10000, R. S. 1909, as one who has signed the instrument as a maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person, and who, by that section, is made liable to a holder for value, notwithstanding the holder, at the time of taking the instrument, knew he was only an accommodation party, is primarily liable to the

holder, under section 10161, which provides that a person primarily liable on an instrument is one who, by the terms thereof, is absolutely required to pay the same.

2. ———: ———: ———: **Effect of Extending Time of Payment.** An accommodation indorser of a promissory note can be discharged only by the discharge of the note in accordance with Sec. 10089, R. S. 1909, since he is primarily liable thereon, under Secs. 10000 and 10161, R. S. 1909, and hence an agreement binding the holder to extend the time of payment, although made without the assent of the indorser, does not release the indorser from liability.
3. ———: **Payment: Renewal Note.** In order that one note may operate as payment of another, there must be an understanding between the parties to that effect, and, in the absence of such an understanding, the renewal note amounts to no more than an agreement on the part of the holder that if it is paid at maturity, the original indebtedness shall be satisfied, and, in the interim, he assumes an obligation, if consideration appear, to await payment until the maturity of the renewal note.
4. ———: **Accommodation Party: Payment: Renewal Note.** The principal maker of a promissory note, which bore an accommodation indorsement, executed a renewal note but the payee retained the original note as collateral, pursuant to an agreement with the principal maker, but without the knowledge of the accommodation indorser. *Held*, that, under Sec. 10089, R. S. 1909, stating under what circumstances a negotiable instrument is discharged, the renewal note was not a payment of the original note, and did not discharge the accommodation indorser from liability on the original note, on the failure of the principal maker to pay the renewal note.
5. ———: ———: **Pledge of Note to Secure Renewal Note: Effect.** The principal maker of a promissory note, which bore an accommodation indorsement, executed a renewal note, but the payee retained the original note as collateral, pursuant to an agreement with the principal maker, but without the knowledge of the accommodation indorser. *Held*, that the principal maker did not, by this transaction, become the "holder" of the note, within Sec. 10160, R. S. 1909, and hence the note was not discharged, under the fifth subdivision of Sec. 10089.
6. ———: **"Holder."** Under Sec. 10160, R. S. 1909, defining the word "holder" as meaning the payee or indorsee of a bill or note, who is in possession of it, or the bearer of it, in order to constitute one the "holder" of a promissory note, he must be in possession or the holder of it.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

REVERSED AND REMANDED (*with directions*).

George B. Webster for appellant.

(1) It was error to instruct the jury that it was admitted that Rosenbaum was an accommodation indorser and that the plaintiff was aware of that fact. It was a fact in issue under the pleadings. The effort of the defendant to testify to it had been defeated on the plaintiff's objection. And there was not only no such admission, but no evidence to that effect. (2) The defendant's instruction number 8 was erroneous in that it omitted the essential element of an agreement to extend, namely, a consideration. R. S. 1909, sec. 10090. (3) The defendant's instruction number 9 was erroneous because it declared as a matter of law that marking paid a note subsequently taken without agreement that it should be a payment of a former note, amounted to a payment of the former note. *Miners Bank v. Rogers*, 123 Mo. App. 569; *Keyser v. Hinkle*, 127 Mo. App. 62; *West Pub. Co. v. Corbett*, 165 Mo. App. 7. (4) It was error to give the defendant's instruction number 10, as there was no evidence on which to base it. There was no testimony that the maker of the note involved put up any collateral when the subsequent notes were taken. On the contrary, all the evidence was that the collateral was put up on the original note. (5) The court should have given the plaintiff's third instruction refused. The bank was a holder for value and had a right to have the jury instructed that in such a case it was immaterial whether Rosenbaum was an accommodation indorser. R. S. 1909, section 10000. (6) Under all the evidence the plaintiff was entitled to recover against Rosenbaum. *Dies v. Wilson Co. Bank*, 165 S. W. 248.

I. Landauer for respondent.

The new notes given March 29, 1912, May 4, 1912, May 4, 1912, May 4, 1912, June 6, 1912, July 6, 1912, discharged the indorser, whether the new notes be considered as payments or agreements for extension of time. *Bank v. Wood*, 56 Mo. App. 214; *Owen v. Bray*, 80 Mo. App. 526; *Donovan v. Clark*, 84 Mo. App. 169; *Jackson v. Bowles*, 67 Mo. 609; *Bank v. Freund*, 80 Mo. App. 657; *Keyser v. Henkle*, 127 Mo. App. 75; *Appleton v. Kennon*, 19 Mo. 637; *Savings Assn. v. Helmerick*, 57 Mo. 100; *Bank v. Leavitt*, 65 Mo. 562; *Stillwell v. Aaron*, 69 Mo. 539; *Johnson v. Bank*, 173 Mo. 171; *White v. Smith*, 174 Mo. 186; *Green v. Skinner*, 75 Miss. 254; *Fellows v. Prentiss*, 3 Denio. 517; *Ogden on Negotiable Inst.*, sec. 227; *Daniels on Negotiable Inst.*, sec. 1, 789. Appellant, on March 29, 1912, May 4, 1912, May 4, 1912, May 4, 1912, June 6, 1912, July 6, 1912, tied its hands respecting the notes in suit, because on their face they were payable at a definite time or times in the future and interest paid on them in advance to the date of their maturity, so that the appellant could not have sued upon them until their due date. *Bank v. Freund*, 80 Mo. App. 657; *Citizens' Bank of Winona v. Evans*, 176 Mo. App. 704; *Bank v. Leavitt*, 65 Mo. 562.

NORTONI, J.—This is a suit on three promissory notes. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

The principal debtor is the Southwestern Produce Distributors, a corporation, and defendant Rosenbaum is an accommodation party, in that he endorsed the several notes in suit for the accommodation of the Southwestern Produce Distributors, at and before their delivery to plaintiff. The maker—that is, the Southwestern Produce Distributors—made no defense to the suit, while defendant Rosenbaum pleads in his answer

that he is an accommodation endorser and as such is discharged from liability, first, because the notes were paid; and, second, because time was extended for the payment to the principal debtor without his knowledge or consent. There is no evidence whatever tending to prove that the notes were paid and the principal matter for consideration here relates to the defense of the accommodation endorser, to the effect that he is discharged from liability because of a valid and binding agreement for an extension of the time of payment entered into between the plaintiff bank and the principal debtor, Southwestern Produce Distributors, without his consent.

The petition is in three counts. Each declares upon a separate promissory note therein described. The first note involved is of date January 9, 1912, and by its terms due sixty days thereafter. On this note a credit of \$250 appears under date of January 27, 1912. The note is signed Southwestern Produce Distributors and on the back thereof endorsed as follows: "Demand for payment, protest and notice of dishonor are hereby waived. L. Rosenbaum." On the execution of the note it was delivered to plaintiff bank, who gave value therefor by the way of a loan of the amount to the principal debtor. On maturity of the note, March 9, 1912, it had been reduced by the partial payment thereon above mentioned, so that \$1750 remained as the balance due. This balance was not paid and the plaintiff bank carried the note as overdue paper until March 29, when the Southwestern Produce Distributors made and delivered to the bank a note representing the same indebtedness—that is, for \$1750,—due thirty days thereafter, on the form generally known as a collateral note, and this new note stipulated a pledge of the prior note—that is, the note now here in suit—as collateral security for the same indebtedness so represented in the second note then taken. However, the note now in suit was retained in possession of the bank all of the

time and it refused to surrender the same, for the reason that it had not been paid. Subsequently, payments were made on the indebtedness and these were credited on the back of the original note—that is, the note now in suit—so as to reduce the amount from \$1750 to \$1195.90. The second note taken for the same indebtedness was not paid, and on May 4, 1912, the Southwestern Produce Distributors executed three new notes in similar form, one for \$395.90, one for \$400, and another for \$400, due on demand, whereupon the second note—that is, for \$1750 of date March 29—was surrendered to that company; but the original note on which defendant was accommodation endorser—that is, the note now in suit here—was retained, as before, collateral to such demand notes representing the same indebtedness.

The second note sued upon is of date January 15, 1912, when it was executed and delivered to plaintiff bank by the Southwestern Produce Distributors, in the amount of \$2500, for a loan. By its terms the note fell due on April 11, 1912. At and prior to its delivery defendant Rosenbaum endorsed the same for the accommodation of the maker and stipulated in writing thereon that he waived demand of payment, protest and notice of dishonor. On maturity of the note, April 11, no portion of it was paid and it was carried by the bank as overdue paper until May 4, at which time the Southwestern Produce Distributors made and delivered to plaintiff, on account of the same indebtedness, five separate demand collateral notes, upon each of which it pledged the original note of \$2500 here in suit. However, the original note was not surrendered by the bank to the maker at the time, for the reason it had not been paid, but the new demand notes stipulated it should be retained by the bank as collateral security for such new notes so representing the same indebtedness. Subsequently, on June 5, there was paid on this indebtedness the sum of \$500, and the amount so paid

was credited upon the back of the original note—that is, the note now in suit—and one of the demand notes therefore taken on May 4 for that amount was surrendered to the Southwestern Produce Distributors.

The note involved in the third count was executed by the Southwestern Produce Distributors to plaintiff bank on the 16th day of January, 1912, in the amount of \$2500, and by its terms fell due on April 15, 1912. On the back of this note, at and before its delivery, defendant Rosenbaum affixed his signature as endorser, waiving demand of payment, protest and notice of dishonor. Certain payments were made on this note, so that, when it matured, \$2248 was the balance unpaid. This balance was not paid and it was carried as overdue paper until May 4, when the Southwestern Produce Distributors executed a thirty-day collateral note to the bank, representing the same indebtedness, upon which it pledged the original note—that is, the note now in suit—as security therefor. Subsequently, several payments were made on the note, until the amount of the indebtedness was reduced to \$2128, and the several credits were endorsed on the back of the original note—that is, the note now in suit—and likewise on the thirty-day note of date May 4, representing the same indebtedness. The note of date May 4 fell due on June 4, 1912, and on June 6 the Southwestern Produce Distributors took it up by giving a new collateral note for the balance due on such indebtedness—that is, \$2128—due thirty days after date, and on this was likewise pledged, as collateral security, the original note, revealing all of the credits above mentioned. When the note of June 6 matured, it had been reduced in amount, so that the balance remaining due of the indebtedness represented by both notes was \$1522, and the several credits showing this result were endorsed on both the original note now in suit so held as collateral and on the new note given on account of the same indebtedness as well. On July 6, the last-

mentioned new note for a period of thirty days was taken up by the Southwestern Produce Distributors executing a new note of that date, which likewise represented the same indebtedness and provided on its face that the original note—that is, the note now here in suit—was pledged as collateral security therefor. When the note last taken matured, there was due on the original debt represented in these notes \$1509.65. No part of this debt was paid and the suit proceeds on the original note.

Though it appears from the facts above stated that several extensions of time as for a fixed period were given on each of the notes in suit through the bank's taking other notes on account of the same indebtedness from the Southwestern Produce Distributors, it appears, too, that none of the notes in suit were ever surrendered by the bank to the maker, but each and all of them were held as collateral to the balance due on the same indebtedness for which they were originally given. There is evidence tending to prove that there was a consideration, such as payment of interest in advance, for the extension of time on the indebtedness represented by the first two notes above described, while, on the other hand, the officers of the bank insist that no interest was paid in advance on any of these transactions, and, therefore, say no consideration for such extension appears. It is conceded that no interest was paid in advance for the extension of time given on account of the indebtedness represented by the note sued upon in the third count of the petition—that is, on any of the extensions made concerning the indebtedness represented in the note of date January 16, 1912; but it is said the deposit of additional collateral sufficed to afford consideration for the extension of time of payment under this note. The evidence is not clear as to this, but, for the purposes of the case, it may be conceded that such consideration appears. We say this, for that, in any view, the defendant Rosenbaum,

an accommodation endorser, is not entitled to be discharged because of an extension of time to the principal debtor, under the provisions of our Negotiable Instruments Law, and this is true even though such extensions were granted to the maker for a definite period on a valid consideration under each of the several notes, without his assent. It appears defendant Rosenbaum did not assent to an extension of time in any of the instances referred to.

Formerly, a valid and binding agreement entered into between the principal maker, and the holder of the note, on sufficient consideration, by which the time for payment was extended to the maker to a day certain operated to discharge an accommodation endorser, who was then regarded secondarily liable and stood in the relation of surety; but this is no longer true. All of the notes in suit here were executed and delivered subsequent to the adoption of our Negotiable Instruments Statutes, which materially change the rule in respect of this matter.

Touching this subject, it is said in 2 Daniels on Negotiable Instruments (6 Ed.), by Calvert, section 1312, that the former rule is abrogated perforce of the Negotiable Instrument Statutes. The author says:

“The statute defines a person ‘primarily’ liable as the person who by the terms of the instrument is absolutely required to pay the same, and declares that all other parties are ‘secondarily’ liable. Other sections of the statute prescribe the conditions under which an instrument is discharged or which will result in the discharge of a person secondarily liable. Under those provisions and the further rule under the statute that a surety is primarily liable, the doctrine of the law of suretyship that a binding extension of time by the creditor to the principal releases the surety has, according to the authorities, been abrogated, and it is generally held under the statute that an agreement with the principal extending the time of payment does not

release from liability one who signed as surety, or as an accommodation maker.”

Defendant Rosenbaum sets forth in his answer that he executed each of the notes described in the three counts of the petition and sued upon as accommodation endorser of the Southwestern Produce Distributors and that this fact was known to plaintiff bank at the time. On this he predicates his right to a discharge because of a valid and binding agreement between plaintiff and the principal debtor for an extension of time concerning the payment of each note which, it is averred, was entered into without his knowledge or consent. This being true, it is conceded, for the purposes of the case, and, indeed, there is no evidence to the contrary, that defendant is an accommodation endorser in each instance, and if, as such, he was secondarily liable on the instrument, he is entitled to his discharge; otherwise not.

Section 10000, Revised Statutes 1909, defines an accommodation party and fixes his status with respect to the obligation assumed. The statute is as follows:

“An accommodation party is one who has signed the instrument as a maker, drawer, acceptor, or endorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.”

The statute expressly declares that such person is liable on the instrument to the holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party. This being true, he is to be regarded as primarily liable thereon, under the provisions of section 10161, Revised Statutes 1909. Indeed, an accommodation maker was primarily liable to the holder of the instrument before the statute, as has been determined by

our Supreme Court (see *Maffat v. Greene*, 149 Mo. 48, 50 S. W. 809); and the statute now renders such an indorser the same.

However, an accommodation indorser was formerly regarded as occupying the relation of surety so as to entitle him to a discharge on account of an extension of time to the principal maker, as will appear by reference to *Weimer v. Shelton*, 7 Mo. 237; *Globe, etc. Ins. Co. v. Carson*, 31 Mo. 218; *Priest v. Watson*, 75 Mo. 310. But though such be true, the statute last cited, when considered together with sections 10089 and 10090, Revised Statutes 1909, abrogates the rule, in so far as it formerly afforded a discharge to the accommodation indorser on the grounds of suretyship, for these sections (10089 and 10090) confine the right to discharge, except where the instrument itself is discharged, to persons secondarily liable thereon, and an accommodation party is not secondarily liable.

Section 10161, Revised Statutes 1909, declares:

"The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable."

As before stated, both before and since the statute an accommodation maker is primarily liable on the instrument. There is no provision in the statute for the discharge of a person primarily liable through a binding agreement for an extension of time entered into, but this right is accorded only in favor of those secondarily liable. Persons primarily liable are acquitted of liability only by such acts as operate to discharge the instrument itself under section 10089, Revised Statutes 1909. But it is otherwise with persons secondarily liable. Section 10090, Revised Statutes 1909, concerning this is as follows:

"A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) by the intentional cancellation of his

signature by the holder; (3) by the discharge of a prior party, except when such discharge is had in bankruptcy proceedings; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by an agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

The sixth subdivision of the statute last quoted prescribes a discharge from liability to persons secondarily liable by an agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. But, as before said, this alone is not sufficient to discharge a person who is primarily liable, under the statutes above quoted, and it is now well settled that an accommodation endorser is primarily liable on the instrument, under the provision of section 10,000 *supra*, as will appear by reference to the following authorities in point: *Union Trust Co. v. McGinty*, — Mass. —, 98 N. E. 679; *Wolstenholme v. Smith*, 34 Utah, 300. So, too, is a surety who signs with the principal debtor as a joint maker of a note primarily liable thereon, as has been determined by the Kansas City Court of Appeals in *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514. [See, also, *Bank of Senath v. Douglass*, 178 Mo. App. 664, 161 S. W. 601; *Vanderford v. Farmers' Bank*, 105 Md. 164.] We regard the rule of these cases as not only reflecting the correct view of the Negotiable Instrument Statutes but as tending to lend stability and support to credit on commercial paper, for, indeed, the prior state of the law in respect of the same question was highly techni-

cal and entailed harsh results frequently without just cause whatever.

Defendant Rosenbaum, being primarily liable on the notes in suit, could be discharged only in event such instruments were discharged. The statute (section 10089, R. S. 1909) concerning this is as follows:

“A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right.” [See, also, *Union Trust Co. v. McGinty*, — Mass. —, 98 N. E. 679; *Wolstenholme v. Smith*, 34 Utah, 300.]

There is no evidence whatever to the effect that the instruments were paid, save the fact that some of the renewal notes to the Southwestern Produce Distributors were marked paid when others were given in lieu of them. The evidence is all of one accord to the effect that the original notes now sued upon were not paid and the bank refused to surrender them for that reason. However, when one of the renewal notes by which the time of payment was extended matured and to secure which the original notes were held as collateral, a new or renewal note according an additional extension of time would be taken. On taking such renewal note, the prior intermediate renewal note, by which time was extended, would be stamped paid and surrendered, but the original notes sued upon were always retained for the reason they were not paid, and this, too, with an express understanding between the parties—that is, the principal maker and the bank.

Obviously these transactions did not amount to payment of the notes in suit, for, in order that one

note may operate as payment of another, there must be an understanding between the parties to that effect; otherwise, such notes so given in extension and on account of the same indebtedness are regarded as merely conditional payments, in event they are not actually paid when due. The original indebtedness continues to subsist as before, unless, as above stated, an agreement between the parties reveals an intention to extinguish the indebtedness as through payment. [See *Kayser v. Hinkle*, 127 Mo. App. 62, 106 S. W. 98.] When the holder receives a renewal note thus as conditional payment, it amounts to no more than an agreement on his part that if such note is paid at maturity the original indebtedness shall be satisfied and in the interim he assumes an obligation, if consideration appear, to await the payment until the maturity of the renewal note. [See *Bank v. Leavitt*, 65 Mo. 562.] It appearing conclusively as it does that the parties merely intended an extension of the time of payment and that it was agreed the indebtedness should not be extinguished by such renewals, the defense of payment wholly failed.

But it is urged that the transactions by which the new notes were taken and the original notes now sued upon pledged as collateral security thereto operated as a discharge of such instruments—that is, the original notes were constructively taken up by the original maker and reissued as a pledge in security of the new notes, which were in fact but renewals of the subsisting indebtedness. What is said in *Bank v. Evans*, 176 Mo. App. 704, 159 S. W. 765, is relied upon in support of this argument. But obviously that case is wholly beside the question in judgment here. The notes there in suit were executed in 1902, at which time the contract of guaranty was entered into and the rights of the parties became fixed, and this was long prior to the adoption of the Negotiable Instrument Statutes. Moreover, the notes involved in that case

were Mississippi contracts and the Negotiable Instruments Statutes of that State, if any, were not in evidence. The case was, therefore, disposed of without reference to the new rule reflected in the statutes—that is, according to the law merchant and common law of pledge. The question here is to be determined by reference to those statutes, for these are Missouri notes made subsequent to the Negotiable Instruments Act.

It appears that the several instruments on which defendant Rosenbaum is an accommodation party and, therefore, primarily liable, could be discharged so as to relieve him from the obligation to respond thereon only in the manner pointed out by the statute (section 10089, R. S. 1909). This statute is as follows:

“A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right.”

The only one of the five subdivisions of the statute relevant for consideration here on this question is the fifth—that is, “When the principal debtor becomes the holder of the instrument at or after maturity in his own right.” Although it be true that the transaction by which the new notes were taken for the same indebtedness provided, too, that the original notes in suit should be pledged as collateral therefor, it is conceded throughout the case that none of these original notes was ever surrendered to the principal maker. On the contrary they were retained by the bank, for the reason, as before said, they were not paid, and the agreement to that effect was accordingly made in order

to effectuate the collateral security vouchsafed therein by utilizing the endorsement of Rosenbaum. However, if the principal debtor, the Southwestern Produce Distributors, became holder of such instrument at or after maturity in its own right through these transactions, then the instruments sued upon are discharged and Rosenbaum and all others acquitted of liability thereon. It becomes then important to ascertain the meaning of the word "holder" employed in section 10089. By section 10160, Revised Statutes 1909, the word "holder" is defined for the purpose of the Negotiable Instrument Act, and it is to be treated with in the sense there given. The definition is as follows:

" 'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof."

The principal debtor, Southwestern Produce Distributors, was neither the payee nor endorsee of the note, neither was it the bearer thereof. Moreover, the definition above quoted implies that, in order to be a holder, one must be in possession of the note or the bearer thereof. Of course, the bearer is to be regarded as in possession. There is nothing in the evidence tending to prove that the Southwestern Produce Distributors, the principal maker, was ever in possession of any of these notes as between these parties during any of the time or that it was the bearer thereof. On the contrary it appears it was not. Indeed, the notes were retained by the bank, denying the maker's right to possession and this, too, under an express agreement to that effect on its part. This being true, it is clear that the principal debtor never became the "holder" of the instrument, at or after its maturity, in his own right, for, indeed, they were retained at all times by the bank and though the transaction may have involved a constructive taking up and reissue of the

notes through pledging them as collateral, they were not discharged under the statute.

It appearing as it does that there is no valid defense whatever to the notes in suit, the judgment should be reversed and the cause remanded with directions to the trial court to enter judgment for the plaintiff bank for the amount due with interest on each of the notes sued upon. It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

MARGUERITA SCHUELER, Administratrix, Appellant, v. CITY OF KIRKWOOD, Respondent.

St. Louis Court of Appeals, June 8, 1915.

1. **MUNICIPAL CORPORATIONS: Construction of Sewers: Sufficiency of Specifications: Delegation of Power.** An ordinance for the construction of aseptic tanks as part of a sewer system of a city of the fourth class, which provided that the tanks should have a sufficient capacity to purify the usual dry weather flow for a population of fifteen hundred people, that the sewage delivered to the tanks should be purified to the extent of ninety per cent. of solids, that the effluent discharge be not putrescible and be free from color and odor, and that the tanks should be built in such manner and of such material as to be satisfactory, in point of strength, to the city engineer, sufficiently stipulated the character of the tanks, within Sec. 9384, R. S. 1909, and the provision committing to the engineer the matter of material and strength was, at most, an irregularity, and did not render the contract for the construction of the tanks, in accordance with the ordinance, void.
2. ———: ———: **Sufficiency of Acceptance of Work.** The fact that the board of aldermen of a city of the fourth class accepted, by resolution, instead of by ordinance, aseptic tanks constructed by a contractor, as a part of the sewer system of the city, did not affect the right of the contractor to recover the reasonable value of the work.
3. ———: **Public Improvements: Irregular Exercise of Powers: Estoppel: Recovery on Quantum Meruit.** Where power has been conferred on a city to make a contract, and services have

been rendered in compliance therewith, and the city retains the benefit thereof, the city is estopped to deny a recovery for the reasonable value of the work, asserted independently of the contract, though predicated on its fulfillment, on the ground that the contract was irregular in some respect, or that the power to enter into it was exercised defectively; but, in such a case, the recovery must not exceed the contract price.

4. ———: **Construction of Sewers: Installation of Aseptic Tanks: Powers of City.** Under Sec. 9384, R. S. 1909, conferring power on cities of the fourth class to establish sewers, such a city may provide by an ordinance and a contract thereunder for the installation of aseptic tanks as a part of a sewer system to be constructed, although the power to install such tanks is not directly conferred; and where a city of the fourth class undertook, by an ordinance and a contract thereunder, to provide for the installation of aseptic tanks as a part of a sewer system to be constructed, the fact that the ordinance provided for such tanks was, of itself, a determination by the city that the tanks were indispensable to its sewer system, satisfying the rule that, where a city relies on an implied power, the thing it undertakes to do must be indispensable.
5. ———: **Officers: Presumption of Correct Action.** Where nothing to the contrary appears, the law presumes that city authorities did not exceed the power conferred upon them.
6. ———: **Public Improvements: Stipulation for Payment from Special Fund: Right of Recovery by Contractor.** Where a contractor performs services for a municipality under an ordinance or contract stipulating that his compensation shall be from a special fund to be raised therefor, and such fund, when accumulated, is diverted by the municipality to another purpose, the diversion is a breach of trust, and the contractor may enforce his claim against the general revenue of the municipality; and this is true notwithstanding the fund was raised by levying taxes under an ordinance which was subsequently declared unconstitutional, since taxes voluntarily paid under a void levy cannot be recovered.

Appeal from St. Louis County Circuit Court.—*Hon. G. A. Wurdeman*, Judge.

REVERSED AND REMANDED.

Thomas Bond and *Walter N. Davis* for appellant.

(1) Unless by authority of statute, money voluntarily paid to discharge a tax cannot be recovered

back because the tax was irregular or void. State ex rel. Rice v. Powell, 44 Mo. 436; 4 Dillon on Municipal Corporations (5 Ed.), secs. 1617-1619; Robins v. Latham, 134 Mo. 466. (2) If moneys belonging to a particular fund have been received by the city, then a diversion of these moneys from the fund, by the city, is a breach of contract, for which the city is liable. Vallean v. Newton County, 72 Mo. 593; Vallean v. Newton Co., 81 Mo. 591; 4 Dillon on Municipal Corporations (5 Ed.), sec. 860; 28 Cyc., page 1058; Allen v. Davenport, 107 Iowa, 90; 20 Am. & Eng. Ency. of Law, page 1176. (3) Even though the original contract was unauthorized, yet where the work has been done and the city has accepted the work and money has been paid into a particular fund by the taxpayers, in payment of that work, the city is estopped to deny the claim. Union Depot v. St. Louis, 76 Mo. 393; Whitworth v. Webb City, 204 Mo. 579;

Robt. C. Powell for respondent.

(1) It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. 1 Dillon on Municipal Corporations (5 Ed.), page 448, sec. 237; Leach v. Cargill, 60 Mo. 316; State v. Butler, 178 Mo. 272; Joplin v. Leckie, 78 Mo. App. 8; Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637; Sec. 6759, R. S. 1899 (now Sec. 2778, R. S. 1909, and cases cited in note); Likes v. City of Rolla, 167 S. W. 645. (2) When special powers are conferred or where a special method is prescribed for the exer-

cise and execution of a power, this brings the exercise of such power within the provision of the maxim *expressio unius*, etc., and by necessary implication forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out. *Kolkmeier v. City of Jefferson*, 75 Mo. App. 683; *City of Unionville v. Martin*, 95 Mo. App. 28; *Heidelberg v. St. Francois Co.*, 100 Mo. 74; *McKissock v. Mt. Pleasant Twp.*, 48 Mo. App. 416; *Cotter v. Kansas City*, 251 Mo. 224; *Likes v. City of Rolla*, 167 S. W. 645. (3) The alleged contract was void. First, admitted by appellant; second, because it was improperly executed. *Matthews v. City*, 68 Mo. 115; *Neill v. Gates*, 152 Mo. 585; *Rugles v. Collier*, 43 Mo. 353; *Smith on Municipal Corporations*, sec. 564; *Cooley on Constitutional Limitations* (4 Ed.), page 248; *City of Unionville v. Martin*, 95 Mo. App. 28. Third, at the time it purports to have been executed the city had not approved or adopted any plans or specification for the septic tanks therein contemplated and had not by ordinance provided the extent, dimensions or regulations of the construction of such tanks. Sec. 5969, R. S. 1899 (now Sec. 9384, R. S. 1909); *Neill v. Gates*, *supra*. Fourth, at the time the alleged contract purports to have been executed no estimate of the cost of building said tanks was made by the city engineer or other proper officer of said city and submitted to the board of aldermen. Sec. 5985, R. S. 1899 (now Sec. 9407, R. S. 1909). Fifth, because the ordinance, the alleged father of the contract, was void and so held by our Supreme Court. *Union Trust Co. v. Pagenstecher*, 221 Mo. 121, 131. Sixth, *Kirkwood*, as a city of the fourth class, had no power or authority, at that time, by statute or incident thereto, to build the septic tanks mentioned and described in the alleged contract. Sec. 9391, R. S. 1909, *Laws 1909*, page 304. (4) The alleged contract was not carried out in that only two tanks were built instead of three and proof failed to substantiate plaintiff's contention

that the defendant failed and refused to provide location for the third tank, in explanation of failure to build the third tank. (5) The alleged cause of action attempted to be stated in plaintiff's petition did not accrue within five years next before the commencement of this suit.

NORTONI, J.—This is a suit for the reasonable value of two aseptic tanks installed by plaintiff's decedent under a contract with defendant city as parcel of its public sewer system. The amount sued for is \$4700 and interest. At the conclusion of the evidence the court directed a verdict for defendant and plaintiff prosecutes the appeal.

Plaintiff is administratrix of the estate of her deceased husband, Charles Schueler, and sues in that capacity. Defendant, a city of the fourth class, interposes a more or less technical defense, to the effect the contract for the installation of the several aseptic tanks was void; also that it was not within the power of the city.

It appears that, on the 20th day of February, 1905, the city of Kirkwood, under its ordinance number 302, duly enacted, provided for the building and construction of a system of public sewers. The ordinance set out in detail the course, routes, dimensions and materials to be employed in the construction of the sewer system and provided, too, that aseptic tanks should be used in connection therewith, as is indicated on the map of the sewer system of Kirkwood, prepared by R. M. Douglass, now on file with the city clerk of Kirkwood.

By section 4 of this ordinance it was provided substantially that there should be constructed and installed three aseptic tanks, which are by the ordinance declared to be a part of the public sewer system of the city, one of such tanks to be located on the southeast corner of Monroe and Taylor avenues; one to be lo-

ated in St. Peters' Cemetery; and one to be located at a designated point on private property. The ordinance stipulated that such aseptic tanks should be of a sufficient capacity to purify the usual dry weather flow for a population of 1500 people, so that the sewage delivered to said tanks be purified to the extent of consumption of ninety per cent of solids; that the effluent discharge be not putrescible and be free from color or odor, and that the tanks be built in such manner and of such material as to be satisfactory in point of strength to the city engineer; also that bids be received and contracts let for the construction of such tanks, under the ordinance, either as a whole, or for the construction of any one or more of them; that the mayor and board of aldermen cause the aseptic tanks above provided for to be constructed by contract or contracts awarded to the lowest and best bidder; after which follows the requirements touching the matter for advertisements, for bids, acceptance thereof and requiring the same to be filed with the city clerk, etc. The ordinance further provided that, upon the award of the work by the board of aldermen, the successful bidder shall enter into a contract with the city of Kirkwood to faithfully do and perform the work in accordance with the provisions and requirements of the ordinance, and that the work should be constructed under the supervision of the sewer committee of such board, which committee is required to personally inspect the work as it progresses.

Touching the matter of compensation, it is provided by the ordinance that the tanks and installation shall be paid for from a fund raised by levying a tax on all of the property within the city of Kirkwood made taxable for such purposes. The ordinance directs that the contract or contracts shall be signed on behalf of the city of Kirkwood by the mayor, and attested by the city clerk, who shall cause the seal of the city to be thereto affixed.

Thereafter, on April 7, 1905, in pursuance of the ordinance the board of aldermen took up for consideration bids for the installation of such aseptic tanks and acted thereon as follows, as evidenced by the records of such board:

"The board took up for consideration the bids for aseptic tanks, and the bid of Charles Schueler being the lowest and best bid, and the same, . . . being within the estimate submitted to the board of aldermen by the city engineer, was accepted by the board, and the mayor directed to enter into contract with said Schueler for building said aseptic tanks, etc."

Subsequently, on the first day of May, 1905, in pursuance of the resolution above quoted and the foregoing ordinance, the mayor and city clerk on behalf of the city entered into a contract with Charles Schueler for the building of the three aseptic tanks mentioned in the ordinance, and this contract with all its details duly executed appears in evidence. Among other things, the contract so entered into between the mayor and Charles Schueler recites, in effect, that the tanks shall be built in accordance with the requirements of the ordinance and that the city shall have a period of one year after the completion in which to test the same before payment shall be made. The contract provides for the building of two tanks and likewise the building of a third tank, upon the performance of certain matters by the city of Kirkwood, which were not performed, and the third was therefore not installed. No claim is made on account of the third in this suit, which proceeds, as before stated, for the reasonable value for installing two of the tanks only.

The two aseptic tanks mentioned in the petition were duly installed by the contractor, Charles Schueler, in accordance with the requirements of the ordinance and the contract, and under the supervision of the sewer committee and the city engineer, so as to be completed on the first day of June, 1906, and ever since

that date have been in use by defendant city as a part of its sewer system. Indeed, thereafter, on the fourth day of September, 1906, and again on the nineteenth day of September, 1907, the board of aldermen, upon the recommendation of the sewer committee and by a formal vote, approved the performance on the part of Schueler, the contractor, and accepted the tanks and, as before said, they have ever since been in use by the city.

In connection with the construction of the sewer system, the city passed an ordinance levying a tax of \$2.50 per hundred dollars on the assessed valuation of all the property of the city of Kirkwood, in order to raise the money to pay for the same, and the collection of this tax was subsequently restrained by certain property holders, on the theory that it was unconstitutional. However, as much as, or more than, twenty-three thousand dollars were paid into the city treasury on account of such tax, for the purpose of compensating the construction of the sewer system, including the aseptic tanks, when the court declared the ordinance levying such tax to be void, for that it exceeded the constitutional limit of fifty cents per hundred dollars on the valuation of the entire taxable wealth of the city. [See *Union Trust Co. v. Pagenstecher*, 221 Mo. 121, 119 S. W. 1103.] Something more than three thousand dollars were also paid in on account of the tax thereafter, however, and it appears that, in all, the city collected over \$26,000 of taxes with which to construct and pay for the sewer system including the aseptic tanks. More than \$7000 of this tax, under the provisions of the ordinance, were levied and collected for the purpose of compensating the installation of aseptic tanks, and this amount was on hand in the city treasury at the time the board of aldermen passed the resolution approving and accepting the tanks and the work installing them. But it appears that, after the decision of the Supreme Court declaring

the tax void, the city diverted all of these monies into other channels, and refused to pay plaintiff's husband for the tanks so installed by him as above indicated.

On what theory the court directed a verdict for defendant does not appear, but it is argued here that plaintiff may not recover for the reason the contract was void because it does not appear that plans and specifications pertaining to the tanks were on file with the city clerk prior to the time the contract was entered into. Touching this matter, the statute (section 9384, R. S. 1909) requires that the public sewers shall be constructed of such dimensions and under such regulations as may be provided by ordinance. The ordinance sufficiently stipulated the character of the aseptic tanks to be installed, in that it required them to have a sufficient capacity to purify the usual dry weather flow for a population of 1500 people; that the sewage delivered to said tanks should be purified to the extent of consumption of ninety per cent of solids; that the effluent discharge be not putrescible and be free from color or odor; moreover that the tanks should be built in such manner and of such material as to be satisfactory in point of strength to the city engineer. After having thus prescribed the general requisites of such tanks by ordinance, it was competent for the board of aldermen to commit to the city engineer the matter concerning the material and strength thereof. Although the board of aldermen may not delegate legislative discretion to the city engineer, such a minor irregularity as conferring authority on him to approve the detail pertaining to the material and strength of the tanks is not sufficient to render the contract void in the sense essential to destroy its effect as a basis for an estoppel on the part of the city, when it appears the services thereunder have been fully performed and the city availed itself of the benefits. [See *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86.]

It appears affirmatively in the case that the estimate of the cost of the sewers and also of the aseptic tanks made by the city engineer, required by section 5985, Revised Statutes 1899 (same sections, 9407, R. S. 1909), was before the board of aldermen at the time Schueler's bid for constructing the tanks was accepted, and that, upon it appearing the bid was within such estimate, the mayor and city clerk were directed to enter into a written contract with him thereabout. Obviously the contract is not void, and even though some slight irregularities appear in respect of matters of detail contemplated therein, plaintiff is nevertheless entitled to recover the reasonable value of the two aseptic tanks installed and so retained and used by the city.

The mere fact that the board of aldermen accepted the tanks by resolution September 4, 1906, and again September 19, 1907, rather than by ordinance duly passed, is immaterial to plaintiff's right to recover the reasonable value, for the contract entered into and which induced their installation in the first instance was within the power of the city and it is estopped to deny the right of compensation to that extent. Although it be true that an estoppel may not be invoked against a municipal corporation which acts entirely beyond the scope of the power conferred upon it, this doctrine does not obtain as to such matters as fall within the powers conferred. For an application of the broad principle, see *Wilson v. King's Lake Drainage etc. Dist.*, 257 Mo. 266, 165 S. W. 734; s. c., 176 Mo. App. 470, 158 S. W. 931; *Union Depot Co. v. St. Louis*, 76 Mo. 393; s. c., 8 Mo. App. 412. Therefore, where it appears that the power has been conferred upon the municipality to enter into the contract in compliance with which the services have been rendered, the principle of estoppel obtains alike as in the case of individuals, where such contract has been fully complied with and the benefits received thereunder and

retained and used by the adverse party. The right to recover the reasonable value thereof may be asserted independently of the contract, though it is predicated on its fulfillment—that is, by showing compliance with the terms imposed on the part of the party seeking relief—and the mere fact that the contract is, in some respects, irregular or that the power to enter into it, lodged in the corporation was defectively exercised, will not suffice to repel such right as to the benefit conferred on the one part, and received, retained and utilized on the other. [See *Edwards v. City of Kirkwood*, 147 Mo. App. 599, 127 S. W. 378; *Union Depot Co. v. St. Louis*, 76 Mo. 393; s. c., 8 Mo. App. 412.] But, of course, the recovery must not exceed the contract price. [*American Surety Co. v. Fruin-Bambrick Construction Co.*, 182 Mo. App. 667, 166 S. W. 333.]

The evidence tends to prove that plaintiff's decedent installed two of the aseptic tanks precisely in accordance with the contract and that the third one was not installed because of the failure of defendant to provide for its location. The tanks were found sufficient in all respects and the city retained and used them. Obviously the precepts of natural justice suggest that it should pay the reasonable value of the tanks so constructed.

But it is argued the doctrine of estoppel may not be invoked here against defendant, because it was not within the power of the city to provide by ordinance and contract thereunder for the installation of the aseptic tanks. Obviously this argument is without merit. The statute (section 5969, R. S. 1899, now section 9384, R. S. 1909) provides:

“The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to-wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at

such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed, or entirely new throughout, as may be deemed expedient."

Although there is a statute now which expressly authorizes the installation of aseptic tanks, no such provision appears in the section quoted, and that section is identical with section 5969, Revised Statutes 1899, which was in force at the time the contract was entered into. But though such be true, it would seem that the city possessed a clear implied power to install these aseptic tanks as parcel of its public sewer system. The question of power involved here relates to the public sewers, which the statute expressly authorizes the board of aldermen to construct. The ordinance provides for the aseptic tanks as parcel of such public sewer system and expressly declares such tanks to be a part of such system.

It is argued that a municipal corporation possesses and can exercise the following powers and no others: "First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable;" and moreover that any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and such power denied. [See Dillon, *Municipal Corporations* (5 Ed.), section 237.] The point made is, that, as the statute does not expressly authorize the installation of the aseptic tanks in connection with the public sewer system and the power of the municipality touching this matter is, therefore, to be sought among those implied only, it must appear that such tanks were indispensable.

In the absence of evidence on the question showing otherwise, it is to be presumed that the city authorities—that is, the mayor and board of aldermen—properly exercised the discretion lodged in them in providing by ordinance for the aseptic tanks as parcel of the public sewer system. The city authorities evidently not only regarded the aseptic tanks as essential to the sewer system, but as indispensable to the object sought to be attained by them—that is, a complete system of sewage—for the presumption is, if nothing to the contrary appears, which is true here, that they did not exceed the power conferred. Some one must determine as to whether or not the aseptic tanks are essential and indispensable to a complete system of sewage, and manifestly the statute must be regarded as having conferred a discretion thereabout on the board of aldermen.

The ordinance having especially provided for such tanks as a part of the public sewer system, the matter must be viewed here as though they were indispensable thereto, in the absence of any evidence whatever on the subject, one way or the other. Especially is this true when it appears that the aseptic tanks are employed for the purpose of the purification of sewage, as well as mere receptacles therefor. It may be, for aught that appears, that the city of Kirkwood was not provided with any outlet for its sewage, affording a sufficient supply of water to carry it away—that is, such as a river or stream of considerable size. If such be the fact, then no one can doubt that aseptic tanks may be regarded as indispensable, for, otherwise, the sewage might be opened into a small stream without sufficient flow to prevent its pollution, with the resulting spread of disease and disaster, and thus annihilate the very purpose sought to be accomplished by establishing the sewers.

It is provided in the contract under which the tanks were installed that payment therefor shall be made

from the special fund raised by the assessment of the special sewer tax referred to in the statement of facts, and in no case from the general revenue of the city. It appears, as above stated, that the city levied a general sewer tax under the statute (section 5969, R. S. 1899; same section now 9384, R. S. 1909) of \$2.50 per hundred dollars on the assessed valuation of the city, and this tax was declared unconstitutional at the suit of a property holder. However, in the meantime, more than \$26,000 had been voluntarily paid thereon by the property holders of the city of Kirkwood, and as much as, or more than, \$7000 of this was in a fund to compensate for the aseptic tanks, said to be of the value of \$4700. The evidence reveals beyond question that the city diverted all these monies and utilized them for purposes other than that contemplated in the ordinance assessing the tax and under which such taxes were paid into the city treasury. This being true, plaintiff is not precluded by the provision of the contract above referred to exempting the general revenues of the city and providing that the compensation shall be had from such special fund only, for the reason the city violated the trust reposed with respect of this matter. When a contractor performs services for a municipality under an ordinance or other contract provision, stipulating that his compensation shall be made from a special fund to be raised therefor, and such fund, when accumulated, is diverted by the municipal authorities to another purpose instead, such diversion is regarded as a breach of trust on the part of the municipality, so as to permit the contractor to lay his claim against the general revenue of the city in lieu of his rights to recourse against the fund so wrongfully withdrawn and thus rendered unavailable to him. [See *City of Lansing v. Van Corder*, 24 Mich. 456.] The principle has been declared and vindicated as well by our own Supreme Court. [See *Valleau v. Newton County*, 72 Mo. 593; s. c., 81 Mo. App. 591.] The fact that the

fund was raised as taxes under an ordinance subsequently declared unconstitutional in nowise relieves the situation, for taxes voluntarily paid, which might have been successfully resisted as though under a void levy, may not be recovered by those voluntarily paying. [See *Walker v. St. Louis*, 15 Mo. 563; *Christy's Adm'r v. St. Louis*, 20 Mo. 143; *State ex rel. v. Powell*, 44 Mo. 436; *Robins v. Latham*, 134 Mo. 466, 36 S. W. 33.]

The judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

STATE ex rel. ROBERT E. SEE, Relator v. JAMES
R. APPLING et al., Respondents.

St. Louis Court of Appeals, June 8, 1915.

1. **MANDAMUS: Right to Writ.** In order for mandamus to be available, it is essential that the relator have a clear legal right to the thing demanded, and it must be the imperative duty of the respondent to perform the act required.
2. **MUNICIPAL CORPORATIONS: Employment and Compensation of Officers: Right to Dispense with Special Services.** Where the salary of a city marshal was fixed by ordinance, the fact that his predecessors were paid, and that, during a certain period, he was paid, additional compensation for acting as night watchman, pursuant to a resolution adopted by the board of aldermen, did not entitle him to receive such additional compensation after his services as night watchman were dispensed with by the board, since it was within the power of the board to dispense with such services, after which he was entitled only to the salary fixed by ordinance.

Mandamus. Original Proceeding.

ALTERNATIVE WRIT QUASHED.

Ball & Ball for relator.

W. C. Hughes for respondents.

NORTONI, J.—This is a mandamus instituted in this court. Relator is the marshal of Montgomery City, Missouri, while the respondents are the mayor and the several members of the board of aldermen also the clerk of the same city.

It is sought to compel the city authorities to issue a warrant of \$40 in payment of relator's salary as city marshal for the month of March, 1915. The alternative writ was issued of course, in the view that the ordinance of the city fixed relator's salary at such amount. But the fact now appears otherwise.

Relator was elected marshal of Montgomery City on the first Tuesday in April, 1914, and entered upon the performance of his duties immediately thereafter. It appears that the different persons holding the office of city marshal for several years theretofore had been receiving a salary of \$40 per month in compensation for the services rendered both as marshal and night watchman, and relator was paid the same amount for such services during the period including the months of April, 1914 to February, 1915; but at its meeting in March, 1915, the board of aldermen rejected his claim for \$40 salary and allowed \$10 only on that account. Because of this plaintiff sued out the alternative writ of mandamus here, as though the ordinance of the city fixed his salary as marshal at \$40 per month and the officers were remiss in performing their duty in rejecting his claim for such salary during the month of March, 1915.

The ordinance pertaining to the salary of city marshal reveals a blank between the words "the sum of" and "dollars", but as those holding the office of city marshal had theretofore received \$40 per month, and he, too, likewise for a time, relator insisted the same amount was due him.

By the return to the alternative writ, the respondents raise an issue of fact touching the matter of the salary of the marshal as fixed by ordinance, and assert that such salary was fixed therein at \$10 per month, and never at \$40 per month, as insisted by relator. On this issue of fact being raised, the court appointed H. W. Johnson, Esq., to hear the evidence and report his finding of fact concerning the same. The ordinance, as it appears on the records of the city, is as follows:

“The City Marshal shall receive in addition to the fees allowed by ordinance as compensation for his services the sum of — dollars per month, payable monthly.”

But the report of the commissioner abounds with evidence tending to prove that it formerly, as originally enacted, and at least as late as October, 1914, contained the word “ten” where the blank appears, so as to fix the marshal’s salary at \$10 per month. The commissioner finds the fact to be that the ordinance appears on the records of the city as above copied and, then his finding recites as follows:

“At the time of the adoption of the ordinance fixing the marshal’s salary in 1904, and up to October 1914, the evidence shows that the word ten appeared, where the blank now appears in the Ordinance as introduced.”

Among other things, the commissioner finds from the evidence also that it appears to have been the custom of the board of aldermen of Montgomery City, for the mayor and board to designate the marshal as night watchman also, and allow him \$30 per month for his services as such night watchman, in addition to the \$10 per month salary received as marshal under the ordinance, but there is no ordinance of the city providing for the appointment of a night watchman, and it was merely a custom which obtained for many years before relator was elected marshal, and continued for

a time thereafter—that is, until the month of March, 1915.

The commissioner finds that the relator, after being elected marshal, on Tuesday, April 7, 1914, immediately qualified and entered upon the duties of his office, and he finds, too, that, on the 14th day of April, 1914, relator was appointed by the mayor and board of aldermen as night watchmen for ninety days. The commissioner then finds: "Thereafter relator performed the duties of marshal and night watchman, until the 3rd day of February, 1915, when the board of aldermen, by motion entered of record, dispensed with the further services of the night watchman." The commissioner finds, also, that since the date last mentioned, the board of aldermen has refused to audit the marshal's account for more than \$10 per month as salary, and the marshal has refused to accept the same.

The evidence which is incorporated in the commissioner's report is abundant to sustain the finding so made, and, indeed, on the crucial question in the case—that is, as to whether or not the ordinance stipulated the salary of the marshal at \$10 per month at the time—it is overwhelming. The city record book containing the official record of the original ordinance has been produced before us by counsel and it reveals an erasure of the missing word. However, there is no evidence tending to show that relator was in anywise connected with or knew of such erasure, and, indeed, the commissioner expressly so finds this fact in his favor. But though such be true, it is clear the alternative writ should be quashed and the respondents discharged, for that the relator has failed to show a clear legal right to the salary claimed.

In order for the writ of mandamus to be available, it is essential that the relator have a clear legal right to the thing demanded, and it must be the imperative duty of the respondents to perform the act required. [19 Am. & Eng. Ency. Law (2 Ed.), 725;

State ex rel. Doud v. Lesueur, 136 Mo. 452, 38 S. W. 325.]

According to the overwhelming evidence in the record, and the fact as found by the commissioner, the ordinance, as enacted in March, 1904, provided a salary of \$10 per month for the marshal, and even as late as October, 1914, the word "ten" still continued where the blank space now appears. This being true, the marshal's salary is fixed thereby at \$10 per month, and the mere fact that the city paid other marshals \$40 per month, or that it paid relator \$40 per month for a time, is immaterial, in so far as his right to a writ of mandamus is concerned. The finding is, that relator was appointed night watchman by a mere resolution of the board, and continued for several months performing such duties in addition to marshal "until the 3rd day of February, 1915, when the board of aldermen, by motion entered of record, dispensed with the further services of the night watchman." The evidence is, that though he was paid \$40 a month during the time, such payment was in compensation for all the services rendered by him—that is, as marshal and also as night watchman. The fact that the board of aldermen allowed him additional compensation for acting as night watchman, or, for that matter, the fact that the board may have allowed him other and additional compensation than that stipulated in the ordinance for his services as marshal, created no enforceable right in his favor against the city to have such compensation continued. The ordinance stipulated the salary of the marshal, and that alone controls with respect to such office. It was entirely competent for the city authorities to discontinue relator's employment as night watchman, and the ordinance fixing the salary of marshal at \$10 per month, in addition to his fees allowed by law, controls, with respect of that matter. [See *Hisey v. City of Charleston*, 62 Mo. App. 381.]

Although it be true that plaintiff became a candidate for, and was elected to, the office of marshal expecting to receive a salary of \$40 per month as his predecessors had, the city was under no obligation to employ him as night watchman and continue such employment throughout his term as marshal in addition, as it did others, and pay him other salary on account of that service, for the ordinance fixed the salary of marshal at \$10 per month at the time. The matter of employing relator as night watchman, as the authorities appear to have done by resolution on April 14, 1914, for a period of ninety days, was wholly discretionary with the board of aldermen and it was likewise in its discretion to dispense with such services at the end of that period or as it subsequently did on February 3, 1915. It is clear relator had no vested right with respect of this matter.

The alternative writ should be quashed and respondents discharged. It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

THOMAS WARD McMANUS, Appellant, v. CAMILLA S. W. BURROWS et al., Defendants; H. C. GRENNER, Respondent.

St. Louis Court of Appeals, June 8, 1915.

1. **COSTS: Interest.** Court costs, using the term "costs" in its technical sense, do not bear or draw interest.
2. **PARTITION: Allowances to Commissioners: Interest.** Allowances to commissioners in a partition suit, for their services, are within Sec. 7181, R. S. 1909, which provides that interest shall be allowed on money due on any judgment from the day of rendering the same until payment, and such allowances draw interest until paid, although the judgment making the allowances does not state expressly that they shall bear interest.

McManus v. Burrows.

3. **EXECUTIONS: Alias and Pluries Writs.** The right to alias and pluries writs of execution has always been recognized in this State, notwithstanding there is no statute granting it.
4. ———: **Partition: Allowances to Commissioners: Right to Execution.** The fact that attorneys in a partition suit obtained an execution for their services against one of the parties adjudged to pay the same and that the execution was returned satisfied, did not affect the right of a commissioner to obtain an execution for the balance due on the amount awarded him as compensation for his services, against another of the parties, who was adjudged to pay the same.
5. **ATTORNEY AND CLIENT: Authority of Attorney.** The acts of an attorney in representing one client do not bind another client for whom he was not acting at the time.

Appeal from St. Louis City Circuit Court.—*Hon. Le. S. Rassieur*, Judge.

AFFIRMED.

T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe
for appellant.

(1) Under the pronouncement of the Supreme Court of this State in the case of *McManus v. Burrows*, 246 Mo. 438, to the effect that execution number 94, December term, 1908, is in conformity with the judgment, unexceptionable and valid, the payment by appellant of all the costs in said execution itemized as payable by him, on the 24th day of December, 1912, constituted a full and complete satisfaction of his judgment indebtedness; and execution number 114, April term, 1913, is without warrant or authority of law and is a nullity. (2) Execution number 85, February term, 1913, issued by order of Robert M. Nichols in favor of himself and Sim T. Price and against Matthew Park, Trustee, with its return of satisfaction, is preclusive of the rights of the several parties originally entitled thereto to have further execution; hence execution number 114, April term, 1913, is a

mere nullity. *McManus v. Burrows*, 246 Mo. 438. (3) Execution number 114, April term, 1913, is unauthorized by the decree, not in conformity therewith and null and void. *McManus v. Burrows*, supra; *Freeman on Executions*, sec. 42, pp. 64, 65; *Zelle v. Bobb*, 14 Mo. App. 267; *Bain v. Chrisman*, 27 Mo. 293; *Coe v. Ritter*, 86 Mo. 287; *Maloney v. Association*, 57 Mo. App. 384. (4) Fees of commissioners and others in partition, ordered taxed as costs, while collectible by execution against the allotments of the several partitioners, are not such general orders or judgments as are contemplated by the statute and do not bear interest. Sec. 7181, R. S. 1909; *Jones v. Trust Co.*, 105 S. W. 328. For cases on the allowance of interest see also: *Bradley & Co. v. Asher*, 65 Mo. App. 589; *Adler & Sons Clothing Co. v. Corl*, 155 Mo. 149; *Railroad v. Knapp*, *Stout & Co.*, 160 Mo. 396; *State v. Slaughter*, 70 Mo. 484; *State v. Boogher*, 71 Mo. 631.

R. M. Nichols for respondent.

(1) The judgment herein has been declared to be a judgment, and consequently under the statute must bear interest, but if it were a mere "order" it would under the statute bear interest. *McManus v. Burrows*, 246 Mo. 438; *Padley v. Catterlin*, 64 Mo. App. 629; *Kennedy Estate*, 94 Cal. 22, 29 Pac. 412; *Hayden v. Heffernan*, 99 Mich. 262, 29 N. W. 57; *Ritchey v. Carpenter*, 2 Wash. 512, 28 Pac. 380; *Bates v. Wilson*, 18 Cal. 287, 32 Pac. 615; *Carver v. Mayfield*, 29 Tex. Civ. App. 439; *Santa Clara Valley v. Prescott*, 238 Ill. 625, 87 N. E. 852; *Watson v. McManus*, 223 Pa. 583, 72 Atl. 1066; *Daggs v. Bolton*, 6 Ariz. 370, 57 Pac. 611; *Smith v. Smith*, 115 Pac. 166 (Wash. 1911); *Keifer v. Summers*, 137 Ind. 106, 35 N. E. 1103, 36 N. E. 894; *Mann v. Poole*, 48 S. Car. 154, 25 S. E. 229; *Baum v. Reed*, 74 Pa. St. 320; *Washington v. Denton*, etc., *Bank*, 64 Tex. 4; *Tit. "Interest,"* 22 Cyc. 1521. (2)

Interest at six percent per annum is a part of any judgment or order of any court in this state; it is given by the statute in a contractual sense and by way of compensation for delay in payment. Realty Co. v. Insurance Co., 179 Mo. App. 138; R. S. 1909, secs. 7179, 7181; Devlin v. New York, 131 N. Y. 123, 30 N. E. 45; Smith v. Buffalo, 39 N. Y. S. 881; Hobbs v. United States, 19 Court of Claims 220; Natl. Bank v. Mechanics Natl. Bank, 94 U. S. 437, 24 L. Ed. 176; Re John Osborne's Sons & Co., 100 C. C. A. 392, 117 Fed. 184; Bowen v. Minneapolis, 47 Minn. 119, 59 N. W. 683.

(3) The interest accruing or accrued upon a judgment, being contractual and directed by the statute, becomes a part of the debt, and the acceptance of the principal, if such were the case, is no obstacle to a recovery of the interest. Martin's Ex. v. St. Louis, 139 Mo. 246; Hanson v. Crawford, 130 Mo. App. 232; Casualty Co. v. Mesker, 128 Mo. App. 183; Johnson v. Tuttle, 17 Abb. Pr. 315; Re Osborne's Sons & Co., 100 C. C. A. 392, 177 Fed. 184; Bennett v. Federal C. & C. Co. (W. Va.), 74 S. E. 418; Henderson Cotton Mfg. Co. v. Lowell Mch. Shops, 86 Ky. 668, 7 S. W. 142; Hobbs v. U. S., 19 Ct. of Claims 220; Natl. Bank v. Mech. Natl. Bank, 95 U. S. 432, 25 L. Ed. 176; Beer v. Foakes, L. R. 11 Q. B. Div. 221, 1 Eng. R. C. 370.

REYNOLDS, P. J.—This is an appeal from an order of the circuit court of the city of St. Louis, overruling a motion to quash an execution, the execution referred to being number 114, returnable to the April, 1913, term of the circuit court. It purports to have been issued on a judgment rendered in an action for partition in which one Thomas Ward McManus was plaintiff and Camilla Burrows and Matthew Park, as trustees, were defendants. The original execution was number 94, returnable to the December, 1908, term of the court. A motion to quash this execution number 94 was made and overruled and from that action the

plaintiff McManus appealed to the Supreme Court. Upon that appeal being taken the sheriff returned the execution "unexecuted and unsatisfied," an appeal bond having been filed. The Supreme Court affirmed the action of the circuit court in an opinion filed December 10, 1912. [See *McManus v. Burrows et al.*, debts; *Price et al.*, resps., 246 Mo. 438, 152 S. W. 3.]

On December 24, 1912, as appears by the receipt of the clerk, Mr. McManus paid to the latter \$7824.55 "for costs in the above entitled cause," as the receipt reads. This is apparently made up of one-half the allowances to the commissioners, the Title Company, the surveyor, and the court costs proper. The mandate of the Supreme Court following the above decision was filed in the circuit court December 31, 1912. It was admitted that on a date not named, but before the issue of the execution now in question, number 114, the clerk paid Mr. Grenner \$2500, one-half of the \$5000 allowance adjudged against Mr. McManus. In this execution number 114, after reciting the judgment in partition, as in execution number 94, it is set out that Camilla Burrows and Matthew Park, trustee, have respectively paid one-sixth and two-sixths of all the court costs, commissioners' fees and attorneys' fees and fees allowed to the Title Guaranty Trust Company and to the surveyor mentioned, and that Thomas Ward McManus has paid one-half of the attorneys' fees, one-half of the fee allowed to the Title Guaranty Trust Company, one-half the fee allowed to the surveyor, and one-half the court costs, and that on December 24, 1912, he (McManus) paid into the hands of the clerk of the court \$7500, as one-half of the commissioners' fees awarded to the commissioners Gerhart, Grenner and Trembley. The execution then proceeds: "Now, therefore, this is to command you that of the goods, chattels and real estate awarded to the said Thomas Ward McManus by the commissioners' report filed in said cause, you cause to be made the sum of \$675, be-

ing the interest upon the sum of \$2500, so ordered to be paid by the said Thomas Ward McManus from the 23rd day of June, 1908, to the 24th day of December, 1912, at the rate of six per cent per annum." This \$2500, for interest whereon this execution was issued against Mr. McManus, is apparently one-half of the \$5000 awarded Mr. Grenner as commissioner. There is no evidence in the case as to any facts attendant upon the payment of this \$2500 to Mr. Grenner; whether he gave a receipt for it, took it as a partial payment or demanded more at the time, either by way of principal or interest, does not appear.

The judgment in partition, which also awarded and taxed up costs to the commissioners and others, was rendered on June 23, 1908; and Mr. McManus paid the clerk of the court the \$7824.55 on December 24, 1912, so that the interest for which this execution number 114 was issued, is for the intervening period.

The question here involved is over the liability of Mr. McManus to pay this interest. The trial court found that interest was due and, overruling the motion to quash and recall this execution number 114, the plaintiff (McManus), saving his exception, has duly appealed to our court.

Learned counsel for appellant here make four points in support of their contention against this action of the circuit court.

The first point made is that under the ruling of the Supreme Court in the McManus case; *supra*, to the effect that execution number 94, the execution returnable to the December term, 1908, is in conformity with the judgment and is unexceptionable and valid, that the payment, on December 24, 1912, by appellant of all the costs as set out in that execution constituted a full and complete satisfaction of his judgment indebtedness, and that the execution here involved is without warrant or authority of law and a nullity.

The second point made is that execution number 85, returnable to the February term, 1913, and issued by order of one of the attorneys in the case in favor of himself and his associate and against Park as the trustee, which was returned satisfied, is preclusive of the rights of the several parties originally entitled thereto to have further execution.

The third point made is that this execution number 114, now involved, is unauthorized by the decree, is not in conformity therewith and null and void.

The final and fourth proposition is that orders that fees of commissioners and others in partition be taxed as costs, while making such fees and allowances collectible by execution against the allotment of the several partitioners, are not such general orders or judgments as are contemplated by the statute and do not bear interest. This latter point is really the crucial point in the case, and we will consider it first.

That court costs, using the term "costs" in its technical sense, do not bear or draw interest, is, we think, the unchallenged and unquestioned law and practice in our State; not by positive law but, as far as we are aware, accepted as the law in this State. The application of that rule here, however, is the question; that is, whether these allowances to the commissioners for their services in partition are to be treated as ordinary court costs. We hold that this proposition is settled adversely to the claim of the appellant by what is said by our Supreme Court in the *McManus* case, *supra*. There, at page 443, it is said, referring to the judgment in partition being against the partitioners and in favor of those to whom allowances are made:

"Those in whose favor these allowances or costs are adjudged in cases of this kind are, under the special statute (Revised Statutes 1909, section 2279), entitled to control the judgment therefor in their favor and, for that matter, would seem to be as much 'parties'

to the judgment in their favor as any other who secures a money judgment. Their relation to the judgment is very different from that of the court official entitled to fees accruing in connection with an ordinary action and whose rights with respect to collecting his fees or costs are defined by a wholly different statute."

As we understand it, the effect of this holding of our Supreme Court, is, to make these commissioners and others who are awarded compensation for their services practically judgment creditors; parties entitled to make their judgment as any other parties to the record. As to all such our statute (sec. 7181, Revised Statutes 1909) provides: "Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property."

Learned counsel for appellant refer us to *Bradley, Wheeler & Co. v. Asher*, 65 Mo. App. 589; *Adler & Sons Clothing Co. v. Corl*, 155 Mo. 149, 55 S. W. 1017; *St. Louis, Keokuk & Northwestern Ry. Co. v. Knapp-Stout & Company*, 160 Mo. 396, 61 S. W. 300, and other decisions of our courts, in support of their proposition that orders allowing fees to commissioners and the like are not such general orders and judgments as are in contemplation of our statute (section 7181, *supra*), and hence do not bear interest.

While in most, if not all, of these cases it is held that interest is the creature of the statute (referring to what is now section 7179, Revised Statutes 1909), we find none of them in point as covering the matter of interest on allowances made to commissioners in partition or like allowances.

In *St. Louis, Keokuk & Northwestern Ry. Co. v. Knapp-Stout & Company*, *supra*, cited by counsel for appellant in support of their claim that interest is not allowable unless given by statute, the plaintiff railway

company brought a condemnation proceeding and paid into court, as provided by statute, the amount of damages awarded the landowner, who, as allowed by statute, drew this down. The railway company, on a trial before a jury in the condemnation proceedings, was cast in a less sum. Our Supreme Court held that under this state of facts plaintiff was not entitled to interest on the excess of the first award over the final award. That presents no parallel to and is no authority in the case at bar.

Nor is it accurate to say that we can only look to section 7179, Revised Statutes, 1909, as imposing liability for interest. That is only partly true, for as we have seen, section 7181 provides for interest on money due upon "any judgment or order of any court." This is the section that is to be applied here, not section 7179.

The case most strongly relied upon, however, by learned counsel, referred to by them as "a case directly in point," and by which, as those counsel say, they "are happily afforded an authority peculiarly germane to the controversy herein," is that of *Jones v. United States & Mexican Trust Co.*, 47 Tex. Civ. App. 430, 105 S. W. 328. Counsel quote very fully from the opinion in that case. On a very careful examination of the facts in decision in this case, we are compelled to say that we do not think it sustains the learned counsel. The facts are different from those in the case at bar. There Jones, the plaintiff and appellant, was the receiver of a railway, to whom in the course of his receivership and in his favor the court made an allowance of \$10,000, and directed that it be classed as court costs, the court further ordering that this allowance should be held superior to the mortgage bonds and that the receiver pay it out of any money he might have on hand. The Texas Court of Civil Appeals held that under the statute and practice in the Texas courts allowances to this receiver stood as other

court costs, the court saying of the allowance to a receiver (l. c. 433, Tex. Civ. App. 329 S. W.): "The compensation thus allowed him is classed as court costs, and is in the same group with the fees of the sheriff and clerk of the court." Our Supreme Court, in the McManus case, *supra*, as we have seen, distinguishes them from ordinary court costs. So we cannot accept it as controlling on the very important and material point.

As another ground for refusing allowance for interest, the Texas court held that this was an allowance "on account," made before the receivership was completed and was not an allowance in full for all the compensation which might be made to the receiver. Finally, and as conclusive, the Texas court held that it appeared by the testimony in the case that the receiver had sufficient funds in his hands, as receiver, belonging to the class out of which his allowance was payable and which he had not seen fit to apply to the payment of his allowance, and that not having done so, he could not now charge the fund in his hands with interest. This is the real point in decision, as set out in the syllabus to the case, which reads thus:

"A receiver of a railway was not entitled to interest on the amount allowed him by order of the court as compensation for his services and to meet which he had funds on hand authorized by the order to be so used, but to provide for the emergencies of the business he had used them to improve the property, thereby postponing his own payment."

This, indeed, is the only syllabus of the case as given in the official report. Hence we must conclude, the insistence of learned counsel for appellant to the contrary, that the decision in the Jones case, *supra*, is not in accordance with our Supreme Court on the classification of these awards, as being of like character as costs awarded the clerk and sheriff, and on its facts it is inapplicable to the facts here.

Turning to the decisions in our own State and to those in other jurisdictions, we find the weight of authority in support of the proposition that this allowance or judgment in favor of these commissioners bears interest from the date of the rendition of the judgment allowing it. Among other cases see *Martin, Exec. v. St. Louis*, 139 Mo. 246, 41 S. W. 231. In that case, a condemnation proceeding, title of the owner of the ground was vested in the city upon the payment by the city of the sum of money awarded to the owner by the commissioners and approved by the court and municipal assembly. Our Supreme Court held that that constituted a judgment or order of the court for the payment of money; that such orders in condemnation proceedings have been placed on the footing of judgments for all practical purposes, and that all the attributes of a judgment are ascribed to such orders in the application of Statutes of Limitation, the right of appeal, and when attacked collaterally. Says the court: "Why should the right to bear interest alone be denied? We can find no sufficient reason why they should not."

In *National Bank v. Mechanics Bank*, 94 U. S. 437, a suit for interest on sums in the hands of the receiver of a national bank, it was held (l. c. 439) that interest lawfully accruing upon each of the claims was as much a part of the claim or debt as the original debt; that the creditor had the same right to the payment of one as the other; that if there had been a judgment, and the full amount due upon it had not been paid, an action of debt might have been brought upon it to recover the balance. "Such balance," says the court, "would have been adjudged to the plaintiff with interest in the shape of damages for the detention of the debt. If, in that case, the judgment debtor had chosen to pay only the principal of the judgment, leaving the interest unsatisfied, and the suit had been for the bal-

ance, consisting of interest only, the same result would have followed.

In the absence of any showing that the principal amount had been drawn down and accepted as in full satisfaction of the demand, the authorities hold that the fact that the judgment creditor had accepted the payment of the principal, did not debar him from the claim for interest.

In *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, '86 Ky. 668, it is held that partial payments on a debt bearing interest must, under the statute, be first applied to the extinguishment of the interest then due and that where a debt bears interest as a matter of law, the fact that the debtor may have made partial payments, amounting in all to a sum equal to the principal, does not extinguish the principal.

In *Devlin v. Mayor, etc., of New York*, 131 N. Y. 123, where the right of interest upon a commissioner's award in a proceeding to condemn property for a public school site, came before the court, the one having received the amount of the award under protest claiming the interest from the date of confirmation to the date of payment, the Court of Appeals of New York held that the compensation allowed by the statute consists in the amount allowed by the commissioners, with interest from the date of the confirmation of the report.

It is true that the judgment here, in making these allowances, does not, in so many words, set out that the amounts awarded and ordered paid are to bear interest. That was not necessary. Where the payment of money is ordered or adjudged, the statute provides for interest and fixes its rate. [*Crook v. Tull*, 111 Mo. 283, 1. c. 291, 20 S. W. 8.]

So our conclusion on the question of whether this allowance made in favor of and ordered by the court to be paid to the commissioners, is entitled to draw interest until it is paid, is, that it was of the judgment and order of the court in the case and draws interest.

In this view of the case it is hardly necessary to notice the other points made by learned counsel for appellant, as we think that the opinion and decision of our Supreme Court in the McManus case, *supra*, covers these points. We refer to that for a fuller statement of the facts. In that case it is held that the execution there issued was in conformity with the judgment; so it can be said of this. Moreover, it was specific in its recital of what had been paid on that judgment and by whom paid, and was distinctly and clearly for the balance due under that judgment and which it is charged remained unpaid by Mr. McManus.

While it has been held that but one judgment and but one execution can issue in a case, that is true as to executions only *sub modo*. Regularly, this writ before us is a pluries execution or writ. It is said by an accepted text-writer, 1 Freeman on Executions (3 Ed.), sec. 48:

“The plaintiff is not limited to his original or first writ of execution, but may call to his aid such further writs as may be necessary to enable him to obtain a full satisfaction of his demand. It is not necessary that the plaintiff should be able to point to any specific statutory provision giving him a right to an additional writ. It is sufficient that the judgment in his favor remains wholly or partially unsatisfied and that the time within which execution may issue thereon has not terminated.”

Alias and pluries writs of execution have always been recognized in our practice, notwithstanding the fact that we have no affirmative, positive, law on the matter. [See for illustration *Bushong v. Taylor*, 82 Mo. 671.]

The second point made by learned counsel, is that by the issue of an execution numbered 85, returnable to the February, 1913, term of the court, issued by order of one of the attorneys for plaintiff here in favor of himself and of another attorney and against Park,

as trustee, with its return of satisfaction, is preclusive of the rights of the several parties originally entitled thereto, to have further execution. We do not think this has any bearing here for the very simple reason that it nowhere appears that the present party, the commissioner at whose instance this execution now under consideration was issued, was any party or in any way connected with the issue of that execution. The acts of these other parties certainly could not in any way preclude him from the assertion of his own rights. That the same attorney acts in both and for each, does not bind the party save as that attorney acted for or represented him. Most lawyers have more than one client and it would be a somewhat dangerous rule to hold that in every action he bound every and any client he might have.

The third proposition, that this present execution is unauthorized by the decree and not in conformity therewith, we think is disposed of by the decision of our Supreme Court in the *McManus* case, *supra*.

We find no reversible error in the action of the trial court and its judgment is affirmed. *Nortoni, J.*, concurs. *Allen, J.*, not sitting.

BENJAMIN L. STONE, Respondent, v. JAMES F. FRY et al., Administrators, Appellants.

St. Louis Court of Appeals. Submitted on Briefs, May 4, 1915.
Opinion Filed June 8, 1915.

1. **WITNESSES:** Transactions with Decedent: Competency of Survivor. Under Sec. 6354, R. S. 1909, providing that, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, one who was a party, and the real party in interest, to a contract was not a competent witness, in an

- action on the contract against the administrators of the other party thereto, although he was not a party to the action.
2. **TRIAL PRACTICE: Reception of Evidence: Effect of Failure to Rule on Objections.** The failure of the trial court to rule on an objection to incompetent evidence is reversible error, where it does not appear that he subsequently ruled on it, or that he did not consider the evidence in making his finding.
 3. **CONVEYANCES: Contradiction by Parol Evidence: Waiver of Objection.** Although parol evidence contradicting the covenants of a deed of conveyance is not admissible, if objection is made, nevertheless where such evidence is admitted without objection, the objection is waived and a finding may be predicated on the evidence.
 4. **APPELLATE PRACTICE: Conclusiveness of Finding.** In an action at law tried to the court, a finding on conflicting evidence is conclusive on the appellate court.
 5. **COVENANTS: Action for Breach: Parties: Joinder of Wife.** In an action for the breach of a covenant in a deed, executed by a husband and a wife, conveying the husband's property, the wife is neither a proper nor a necessary party, in view of Sec. 2788, R. S. 1909, and where the petition declares upon a covenant made by the husband, the fact that the wife joined in the deed would not defeat a recovery, on the theory that there was a variance or failure of proof.
 6. ———: ———: **Statutory Implied Covenants: Pleading.** An allegation in the petition, in an action for the breach of a covenant implied by Sec. 2793, R. S. 1909, in a deed containing the words "grant, bargain and sell," that, in and by such deed, the grantor covenanted and agreed that he would warrant and defend the title to said real estate against taxes assessed against the real estate for a certain year, correctly pleaded the legal effect of the covenant.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones, Judge.*

REVERSED AND REMANDED.

Geo. W. Lubke and *Geo. W. Lubke, Jr.*, for respondent.

George Stone was a competent witness at the second trial of this case as well as at the first trial. The

Stone v. Fry.

transactions about which he was interrogated were had between him, either in his own behalf or as agent of Rosenberg, with the agent of the deceased Brown, who was still living and who testified at both trials. He undertook to testify only as to such transactions as he had with A. F. Brown's agent, who was still living, and in which said A. F. Brown took no part. It has been repeatedly held by the courts of this State that "the statute does not exclude the living party from testifying where the evidence relates to transactions and conversations had with others to which the deceased was not a party, and with which he had no connection, and of which he had no knowledge." *Weiermiller v. Scullin*, 203 Mo. 472; *Kirton v. Bull*, 168 Mo. 622; *Nugent v. Curran*, 77 Mo. 323; *Eyerman v. Piron*, 151 Mo. 107; *Bankhouse v. Rood*, 132 Mo. 256; *Orr v. Rode*, 101 Mo. 387; *Wade v. Hardy*, 75 Mo. 397. Besides, Stone was cross-examined at the first trial of this case by the counsel for defendants upon the whole case, without any objection to his competency at that time, and, therefore, even if he was incompetent as a witness, the objection to his competency was waived by the defendants. *Tierney v. Hannon's Executor*, 81 Mo. App. 488; *Allen v. Chouteau*, 102 Mo. 309; *Leahy v. Reyburn*, 33 Mo. App. 55; *Stone v. Hunt*, 114 Mo. 66; *Edwards v. Latimur*, 183 Mo. 627; *Ess v. Griffith*, 139 Mo. 322; *Imboden v. Trust Co.*, 111 Mo. App. 232.

Fauntleroy, Cullen & Hay for appellant.

The court erred in admitting the testimony of George Stone, because this is an action against the administrators, and George Stone is the party in interest and the other party to the contract and was incompetent for the purpose. *Weiermueller v. Scullin*, 203 Mo. 466; *McClure v. Clement*, 161 Mo. App. 23; *Howard v. Hardy*, 128 Mo. App. 354; *Taylor v. George*,

176 Mo. App. 215; Lieber v. Lieber, 239 Mo. 1; Hoss v. Crawford, 145 Mo. App. 363; Kersey v. O'Day, 173 Mo. 570.

REYNOLDS, P. J.—Action for breach of covenant in a general warranty deed, conveying certain lots in the city of St. Louis, the grantors being A. F. Brown and Mary F. Brown, his wife, the grantee one Sam Rosenberg. The deed is a statutory general warranty deed, excepting however from the covenants, "the taxes for 1908 and thereafter," the breach assigned is failure to pay the taxes for 1907. Contemporaneously with the execution of this deed from Brown and wife to Rosenberg, Rosenberg executed a deed of trust on the same premises to a trustee for A. F. Brown, to secure a principal note due ten years after date and twenty semiannual interest notes, both deeds being dated August 30, 1907, and filed for record September 10, 1907. The deed of trust recites that Rosenberg, in consideration of the debt and trust in the deed mentioned and created and the sum of one dollar to him paid by the trustee, the receipt of which is acknowledged, "does by these presents grant, bargain and sell, convey and confirm unto the said party of the second part" (the trustee) the property described in the deed, and it is further recited that the grantor Rosenberg "has executed this deed of trust and has also agreed with said third party (Brown), his indorsers and assigns, to cause all taxes and assessments, general and special, to be paid whenever imposed upon said property and within the time required by law."

The petition avers that plaintiff is the owner of the premises by mesne conveyance from Rosenberg and that on September 29, 1911, he (plaintiff) paid and discharged the lien of the general taxes for State, school and city purposes, in the amount of \$156.19, and the further sum of \$3.06 for sprinkling taxes, specially

assessed against the real estate in favor of the city of St. Louis, thereby paying the sum of \$159.25, which taxes, it is averred, were a lien upon the property conveyed. Averring a demand by plaintiff on defendants, who are the administrators of the grantor Brown, and that the demand had been refused, plaintiff avers damages in the amount above stated.

The answer, after a general denial, sets up:

First. That at time of sale of the land and as part of the consideration it was agreed that Rosenberg should and would pay these taxes and that for that purpose he retained the amount out of the purchase money, and all this with the knowledge and under direction of the plaintiff, for whom Rosenberg had purchased the land and for whom he held it in trust.

Second. That long after the purchase of the land and execution and delivery of the deed to it, and while Rosenberg held title to it, the full amount of these taxes was paid by Brown to Rosenberg, who then and thereby became a trustee for the plaintiff.

Third. The execution of the deed of trust above set out is averred, its covenant to pay taxes, etc., set up, and it is pleaded that Rosenberg and plaintiff, as holding through him, are estopped from claiming any right by virtue of the covenants in the deed from Brown to Rosenberg.

Fourth. A denial that plaintiff ever acquired any title to the property or that he is successor in the title of Rosenberg and a denial that the taxes mentioned were ever assessed or levied on the land.

Trial was before the court, a jury being waived, and resulted in a verdict for plaintiff, judgment following, from which defendants, administrators of Brown, have duly perfected their appeal to this court.

Learned counsel for appellants make four points upon which they rely for a reversal of the judgment in this case.

It is contended under the first point that one George Stone was an incompetent witness as to transactions or conversations between him and Brown, the latter dead at the time of the trial. These counsel contend that this being an action directly against the administrators of an estate, and this witness being a contracting party with the decedent, and the real party in interest, as well as a party to the contract, was incompetent, the other party to the contract being dead, and that, it is claimed, is true whether the witness was a party to the suit or not.

It is provided by section 6354 that "where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator." This was section 4652 of the Revised Statutes of 1899, and under that designation is construed by our Supreme Court in *Weiermueller v. Scullin*, 203 Mo. 466, 101 S. W. 1088. We refer to that opinion as settling the question of the incompetency of a witness in such case. In *Carroll v. United Railways Co.*, 157 Mo. App. 247, 137 S. W. 303, we had occasion to consider this same question and there held that the exclusion extended to not only the party to the record but to the contract, and so our Supreme Court held in *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458.

An examination of the record in this case, however, makes it impossible to determine whether the trial court considered the testimony of this witness as to transactions and conversations had between him and the decedent. Objection was made to the reception of the testimony, and the court, without then ruling on the objection, received the testimony subject to the objection, to which action of the court, in refusing to

pass on the objection at the time, defendants duly excepted. Beyond doubt this witness should not have been permitted to testify as to any transactions between himself and the decedent, as it clearly appears that while he was not a party to this action, he was a party, and the real party in interest, to the contract. The court should have ruled on the objection and excluded the testimony. It was reversible error to refuse to rule on the objection at the time, or afterwards. [Asbury v. Hicklin, 181 Mo. 658, l. c. 670, 81 S. W. 390; Seafeld v. Bohne, 169 Mo. 537, l. c. 546, 69 S. W. 1051; German-American Bank v. Manning, 133 Mo. App. 294, l. c. 298, 113 S. W. 251; Smoot v. Bankers' Life Assn., 138 Mo. App. 438, l. c. 469, 120 S. W. 749] Here, to repeat, over the objection and exception of defendants the court neither ruled on the objection at the time it was made nor does it afterwards appear what its action was on the objection to this testimony.

The second point made by learned counsel for appellants is, that it appears that the deed of trust was made by Rosenberg back to Brown, or Brown's trustee, to be more accurate, at the same time that the warranty deed was made and that the covenants in the deed of trust modified the covenants in the original deed and exempted Brown and defendants as his administrators from liability on the covenant of general warranty in the deed, and that these covenants estopped plaintiff from now recovering these taxes.

The principal authority relied on in support of this is Geer v. Redman, 92 Mo. 375, 5 S. W. 745. It appears in that case that the defendant there, by warranty deed with general covenants against incumbrances, conveyed to the plaintiff Geer two parcels of land in Ralls county, this State, upon which the taxes for that year had not been paid and which the plaintiff, grantee in the deed, had paid. As a part of the consideration Geer conveyed to Redman certain lands in the State of Michigan and also, and as another part of the con-

sideration, executed and delivered a deed of trust upon the Missouri land to secure the payment of two promissory notes. This deed of trust, in express terms, covenanted to pay all taxes then existing against the land. The opinion recites that it also appears, by parol evidence, that at the time the deeds were made plaintiff agreed to pay the taxes on land in Missouri and paid the taxes on the Michigan land for the same year. Under this state of facts the court says (l. c. 378):

“The deed sued upon and the deed of trust were made upon the same day, delivered at the same time, conveyed the same land, and were different parts of one and the same transaction, and may be taken and read together. The general covenant in the deed was qualified by the special covenant in the deed of trust, and the two instruments show that plaintiff was to pay the taxes for which he sues. Objections were made by the plaintiff to the introduction of the deed of trust in evidence, and to the evidence of the payment of taxes by defendant, and to the parol proof of the agreement with respect to the payment of taxes; but the objections were general, without any ground being assigned, and the case stands as if no objections had been made.” The judgment of the circuit court, which was in favor of the defendant Redman, was accordingly affirmed.

In the case at bar this deed of trust given by Rosenberg to Brown's trustee was introduced and read in evidence without any objection so far as appears in the abstract. Parol evidence was also introduced in this case as to the fact of the payment or nonpayment of the taxes and as to whether they were to be paid by Brown or by Rosenberg. No objection whatever was made to this parol evidence. Our court held in *Laclede Laundry Co. v. Freudenstein*, 179 Mo. App. 175, l. c. 186, 161 S. W. 593, as the result of our examinations of the decisions on the question of introducing parol evidence attacking the consideration: “Ordi-

narily you may attack the consideration, but when to do so involves an attack upon the solemn covenants in the deed or contract, that attack resting on a parol agreement, outside of the deed or contract, it cannot be sustained." But like any other matter admitted without objection, or not aimed at by motion to strike out, it stands. Objection to it may be waived. Here it was waived and on the testimony, the fact as to who had or who was to pay these taxes, was for the determination of the court, the testimony being contradictory. We are bound by the finding of the trial court on it.

It appears by the decision in *Geer v. Redman*, *supra*, that parol evidence having been admitted and received without objection, the covenants in the deed and deed of trust were explained and overcome by the parol evidence so admitted. That is the situation here. We do not find *Geer v. Redman*, *supra*, cited or quoted in any other subsequent case, save that in *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551, it is cited (l. c. 507) in support of the proposition that to determine the propriety of the admission of testimony, the objection to it must be made at the time and must be specific. In *Cleveland Park Land & Improvement Co. v. Campbell*, 65 Mo. App. 109, it is cited and quoted (l. c. 113) on the proposition that the general covenants in the deed were qualified by the special covenants in the deed of trust, and in *Foster v. Byrd*, 119 Mo. App. 168, 96 S. W. 224, at page 174 it is said that neither it nor *Cleveland Park Land & Improvement Co. v. Campbell*, *supra*, applied to the case then before the court, as there was nothing to harmonize between the covenants in the deeds there before the court.

Here it was a question of fact, on the parol evidence admitted without objection, as to who was to pay, or had paid, these taxes, notwithstanding the covenants in the deed and deed of trust, and as before remarked, the learned trial court found this issue

against defendants, on what we must hold was substantial testimony. We are compelled to hold this assignment of counsel untenable.

It is further urged that there is a total failure of proof of the cause of action alleged; that the action is stated to be on the covenant of A. F. Brown and that the proof shows a joint covenant by him and his wife. It is true that Brown was joined in the deed by his wife. But the evidence is that the property was that of Brown and that his wife had no interest in it, save as wife. Section 2788, Revised Statutes 1909, provides that no "covenant in any deed conveying the property of the husband" shall "bind the wife except so far as may be necessary to effectually convey from the husband or wife, so joining therein and not owning the property, all the right, title and interest expressed to be conveyed therein." The covenants of warranty here involved not being binding on the wife, she was not only not a necessary, but would have been, on the facts here present, an improper party. It was not necessary to allege that she had joined in the deed. The action is for a breach of the covenant in the deed. It was pleaded as the covenant of Brown. Under the statute it was his covenant and not that of his wife, so there was neither variance nor failure of proof between the allegation and the deed.

Finally it is urged that the deed does not contain the covenant declared upon. The covenant is pleaded thus:

"Plaintiff further says that in and by said deed executed by said A. F. Brown said Brown covenanted and agreed that he would warrant and forever defend the title to said real estate against the taxes assessed against said real estate for the year 1907 and thereafter."

Our statute (section 2793, Revised Statutes 1909), prescribes the covenants implied in the use of the words "grant, bargain and sale," these words present

in this deed. Plaintiff, as was proper, correctly pleaded the legal effect of the covenant.

For the error in failing to rule on the admissibility of the testimony referred to the judgment of the circuit court must be reversed and the cause remanded. It is so ordered. *Nortoni and Allen, JJ., concur.*

OSCAR SONTAG, Respondent, v. WALDEMAR
UDE, Appellant.

St. Louis Court of Appeals. Submitted on Briefs May 3, 1915.
Opinion Filed June 8, 1915.

1. **PHYSICIANS AND SURGEONS: Malpractice: Liability.** A physician cannot be held for an honest error of judgment, a mistake in matters of doubt, or an uncertainty, and where he uses a recognized system of treatment, he is not negligent.
2. ———: ———: **Sufficiency of Evidence.** In an action against a surgeon for the death of a child, alleged to have been caused by defendant's negligence in inserting a rubber drainage tube in an incision made in the child's body in such a manner that it could, and did, slip into his body, and in failing to discover that the tube had slipped into his body and in failing to remove the same, where the evidence showed that defendant inserted a rubber tube in an incision in the child's body made by him, leaving it unsecured, so that it slipped inside the body, and that the tube was allowed to remain there for some time, *held* that it was a question for the jury whether defendant was guilty of the negligence charged, and, if so, whether such negligence was the proximate cause of the child's death.
3. ———: ———: **Death by Wrongful Act: Cause of Death: Evidence.** In an action against a surgeon for the death of a child, alleged to have been caused by defendant's negligence in inserting a rubber drainage tube in an incision made in the child's body in such a manner that it could, and did, slip into his body, and in failing to discover that the tube had slipped into his body and in failing to remove the same, evidence that, before the tube dropped into the child's body, he showed no indications of suffering from a fatal malady, and that, immediately thereafter, he commenced to waste away, and finally

- died, justified an inference that the proximate cause of death was the dropping of the tube into the body, and it was not essential that expert evidence of that fact be adduced.
4. ———: **Duty.** A physician, holding himself out as such, and undertaking the care and treatment of a baby for pay, owes the baby and its parent careful and skillful treatment.
 5. ———: **Malpractice: Instructions.** In an action against a surgeon for the death of a child, alleged to have been caused by defendant's negligence in inserting a rubber drainage tube in an incision made in the child's body in such a manner that it could, and did, slip into his body, and in failing to discover that the tube has slipped into his body and in failing to remove the same, *held* that an instruction given for plaintiff was not vulnerable to the objections that it assumed negligence, placed the burden on defendant to show that he was not negligent, submitted matters not supported by the evidence, or submitted issues outside of the scope of the pleadings; *held, further*, that plaintiff's instructions were not inconsistent with each other.
 6. **INSTRUCTIONS: Waiver of Generality.** The generality of an instruction is an error of nondirection, not of misdirection, and should be corrected by instructions requested by the adverse party.
 7. ———: **Refusal: Point Covered by Other Instructions.** It is not error to refuse an instruction charging on a point covered by the instructions which are given.
 8. ———: **Cure by Other Instructions.** Objectionable features of instructions may be cured by the instructions given on behalf of the objecting party.
 9. **PHYSICIANS AND SURGEONS: Malpractice: Pleading: Sufficiency of Petition.** In an action against a surgeon for the death of a child, the petition alleged that, while defendant was treating plaintiff's infant child, he performed an operation and made an incision in the child's body; that thereafter he opened this incision and inserted a tube therein for the purpose of draining the diseased part of the infant's body; that he so negligently and unskillfully inserted the tube that it could and did slip inside the body; that he thereafter discovered that it was lost, and might, by the exercise of ordinary care, have ascertained that it had slipped into the body, but that he negligently and unskillfully failed to locate and discover it and remove it; that, by reason of the tube remaining in his body, the child was made sick and grew worse, until some time later, when defendant discovered that the tube was in the body and operated on the infant; and that, by reason of these things, the infant continued to grow worse until he died. Defendant attacked the

Sontag v. Ude.

petition, on appeal, on the ground that it was fatally defective, in that it did not allege specific acts of negligence—did not set out how and in what manner the tube was negligently inserted, nor specifically state what means, treatment or operation could have been used or performed to discover the tube in the body. *Held*, that the petition was sufficient to support a judgment for plaintiff, and that, if it was defective in the particulars claimed by defendant, such defects could not be reached by demurrer.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Morton Jourdan for appellant.

(1) (a) A physician cannot be held for an honest error of judgment, a mistake in matters of doubt, or an uncertainty. *Gore v. Brockman*, 138 Mo. App. 231; *Hales v. Raines*, 146 Mo. App. 232, 245. (b) Where a physician uses a recognized system of treatment he is not negligent. *McClarín v. Grenzfelder*, 147 Mo. App. 478, 488. (2) Plaintiff's first instruction is error, because—(a) It places too great a burden upon defendant. *Spain v. Burch*, 169 Mo. App. 94. (b) It is too general; it allows the jury to speculate upon the negligence of defendant; it sets out no specific acts of negligence. (c) It assumes that defendant was negligent and places the burden of proof upon him to show that he was not. *Van Hooser v. Berghoff*, 90 Mo. 487. (d) There was no evidence submitted to the jury upon which to base negligence in not discovering the tube inside the body of the child. (e) It allows the jury to speculate upon and find defendant negligent with respect to an operation on the child, in regard to which there is no allegation in the petition. (3) Plaintiff's second instruction is error, because—(a) It is inconsistent with and contradicts the first instruction. (b) It is too general; it permits a less amount of proof than a preponderance of evidence as a basis for plaintiff's

recovery. (4) Plaintiff's third instruction is error, because—Defendant does not promise that he will use his best judgment; he merely promises to use his honest judgment and to use the skill, care and prudence of an ordinarily capable doctor. *Gore v. Brockman*, 138 Mo. App. 231. (5) The court erred in refusing defendant's instruction numbered 3, because it is proper and should have been given.

Otto F. Karbe and S. C. Rogers for respondent.

(1) Appellant's demurrer to respondent's evidence was properly overruled. *Black v. Railroad*, 162 Mo. App. 98; *McRae v. Railroad*, 125 Mo. App. 569; *DeMaet v. Storage, Packing & Moving Co.*, 231 Mo. 619; *MacDonald v. Railroad*, 219 Mo. 483; *Sharp v. Railroad*, 213 Mo. 532; *Fields v. Railroad*, 169 Mo. App. 633; *Sang v. St. Louis*, 171 S. W. 347. (2) Plaintiff's first instruction correctly declared the law and hence it was not error in giving it. (3) Plaintiff's second instruction was correctly given. *Wheeler v. Bowles*, 163 Mo. 398. (4) Plaintiff's third instruction is correct and has been approved. *Wheeler v. Bowles*, 163 Mo. 398. (5) The court correctly and thoroughly instructed the jury. *Johnson v. Traction Company*, 176 Mo. App. 174.

REYNOLDS, P. J.—The action in this case is by the father against the defendant for damages for the death of his son, an infant about thirteen months of age at the time of his death, the mother dead.

The petition upon which the case was tried, averring that defendant is a physician and surgeon and as such engaged in the practice of medicine and surgery, avers that the infant son of plaintiff, then about ten months old, became sick about February 14, 1911, with bronchial pneumonia, and plaintiff employed defend-

ant to attend and treat the infant and to render him such medical and surgical aid, treatment and assistance as might become necessary during his sickness, and that defendant, in consideration of a reasonable compensation to be paid him, engaged and undertook to treat and attend to the infant, who was placed under his care and treatment; that while defendant was engaged in attending and treating the infant he performed an operation and caused an incision to be made in the region of the fourth and fifth ribs, under and a little behind the left arm of the infant; that thereafter and on April 13, 1911, defendant opened this incision in the body of the infant and inserted a tube about five inches long through the incision for the purpose of draining the diseased part of the body of the infant. It is charged that defendant so carelessly, negligently, improperly and unskillfully inserted this tube in the incision that it could, would and did slip or fall into the inside of the body of the infant; that thereafter and on this 13th of April, defendant discovered that the tube was lost and that defendant might, by the exercise of ordinary care, have ascertained that the tube had slipped into the inside of the body of the infant and was in his body, but, it is charged, that defendant so carelessly and negligently, improperly and unskillfully failed to locate and discover the tube in the body of the infant and to remove the same therefrom, and that by reason of the tube being and remaining in the body of the infant, he was made sick, suffered great pain and grew worse and weaker until about April 30, 1911, when defendant discovered that the tube was then in the body of the infant and defendant then operated on him and made an incision one and one-half inches long in the side of the body of the infant and removed three-fourths of an inch of one of his ribs and located and removed the tube, and charging that by reason of all of these things the infant continued to grow worse and weaker until May 7, 1911, when, it is averred, he died.

Charging that the death of the infant was directly caused and brought about by reason of the carelessness, negligence, unskillfulness and disregard of duty of and by defendant, as above set out, in so placing the tube in the incision in the body of the infant that it could, would and did slip into the inside of the body of the infant, and in failing to discover, locate and remove the tube within a reasonable time after it had slipped or fallen inside the body of the infant, plaintiff alleges he has been damaged in the sum of \$10,000, for which he demands judgment.

A demurrer was interposed to this. That being overruled, defendant filed an answer, which, admitting that he was a physician and surgeon, denied all other allegations in the petition.

At the trial before the court and jury, there was a verdict in favor of plaintiff in the sum of \$5000. On a motion for new trial being filed the court announced that he would sustain it unless plaintiff remitted \$1500 from the verdict. The remittitur having been made, the motion for new trial was overruled as was also the motion in arrest of judgment which had been filed by defendant. Judgment following for \$3500, defendant has duly appealed to this court.

There was evidence introduced by plaintiff tending to prove that plaintiff himself being sick, called in defendant to attend on him. While defendant was attending upon the father, the infant was taken sick with what was pronounced bronchial pneumonia. Defendant, deeming it necessary to remove an accumulation of matter which had formed on the inside of the body of the infant, assisted by two other surgeons whom he called with the assent of plaintiff, made an incision rather under the arm and toward the back of the infant. This was done March 6th at a hospital. The child was taken home March 15th and was there under the care of defendant, who from time to time inserted a rubber tube into the wound for the purpose of drain-

ing it. It appears that defendant inserting a tube "anchored" it by sticking a safety pin in the tube and through the skin of the child. The plaintiff protesting against this, the pinning to the skin was discontinued. Four or five days after the baby had been taken home his fever disappeared—left him—he was getting along nicely—"getting along fine, getting along nicely," said defendant to the father. He "played around," took nourishment, and was gaining flesh; was "a stout little baby," said the nurse, before and after the first operation and until shortly after April 13th. About April 13th defendant placed a rubber tube in the wound, not securing it. That night he was at plaintiff's home, took supper with him and after supper went upstairs where the baby was, and when he came down told plaintiff that the tube had dropped into the baby and that they would have to operate right away and get the tube out. Plaintiff doubting this, they searched all over the premises in an effort to find the tube, as the baby had been all over the house that day, up and down stairs. Plaintiff insisted on having the baby examined under X-Rays. Defendant, while insisting that the tube was inside the baby's body, said rubber would not show under X-Rays and that the tube might be lying back of a rib and would not show. On April 16th defendant, with the assistance of the same two surgeons and physicians who had assisted in the first operation, again operated on the infant and removed part of a rib but did not find the tube, defendant telling plaintiff that they had made a larger opening, had taken out a portion of the rib, and if there was any pus there it was bound to come out; that the operation "didn't hurt the baby;" that it was all right and they were sure that the tube was not inside. The infant continuing to grow worse from this time on, and plaintiff insisting on the use of the X-Ray, that was finally resorted to and with it the tube was located and removed. This occurred April 29th. The baby died May 7th, following. This was practi-

cally the testimony for plaintiff and of the nurse. The X-Ray plates and the tube which had been taken from the cavity of the body of the baby were before the jury, the plates showing the rubber tube lodged inside, on the latter a lot of offensive matter which had accumulated on and around it. The wound itself had become discolored and the odor from it had become very offensive. It was in evidence that while the baby had apparently completely recovered from the effect of the first operation, he began to fail after April 13th, when the tube fell in, and gradually grew worse, becoming mere skin and bones; took no nourishment; had a high fever, and, as the father testified, "lay like a stone," until he died.

Defendant introduced no testimony but rested on his demurrer.

While the learned counsel for appellant makes nine assignments of error, his brief and argument are confined to five propositions.

First, that a physician cannot be held for an honest error of judgment, a mistake in matters of doubt, or an uncertainty, and where he uses a recognized system of treatment, he is not negligent. These propositions are undoubtedly correct. The difficulty, however, is that there is no evidence here on the part of defendant tending to show an honest error of judgment or a mistake in matters of doubt, or an uncertainty, or that defendant used a recognized system of treatment. The father, plaintiff here, and a nurse, who had had charge of the infant from the time of its first sickness until its death, gave all the testimony in the case, apart from that relating to the taking of the X-Ray picture, and we have given a very brief sketch of their testimony. Defendant introduced no testimony. So that it was on the testimony given by the plaintiff and the nurse that the jury were to determine whether the defendant acted in a negligent, or skillful and proper manner. With that testimony before it, although unaided by

professional expert evidence, the jury, as intelligent men, were competent to say whether the conduct of defendant was proper. The negligence charged is the insertion of a rubber tube in the wound and leaving it there unsecured, so that it slipped inside of the body; that is the primary negligence charged; then follows the charge that this tube was allowed to remain in the cavity so long that death resulted when it was finally removed. Whether these were acts of negligence, was for the jury. Whether these acts were the proximate cause of death was within the competency and intelligence of the jury to determine. No professional—no opinion—evidence was necessary, so far as plaintiff's case was concerned. If these matters were not the cause, if defendant's conduct was that of a reasonably skillful surgeon and physician, it was for him to have put in his proof. The facts in evidence, if believed by the jury, were of sufficient probative force to warrant the jury in holding defendant liable for the negligence charged, those facts undisputed. On them the jury had a right to infer that the immediate and proximate cause of death was the slipping into the open wound, and then into the cavity of the chest or body, of this unsecured rubber tube, and then leaving it there for the time shown.

It is said by the Kansas City Court of Appeals in *Fields v. Metropolitan St. Ry. Co.*, 169 Mo. App. 624, l. c. 633, 155 S. W. 845, that where the evidence shows that before an injury the party injured was a healthy, strong person and that a short time after the accident he began to exhibit signs of nervous shock and of severe internal injuries, that the jury was entitled to draw the conclusion that the negligence of the defendant had transformed a healthy person into a hopeless invalid. That, says the court, is but a statement of a proposition so well established, that the jury had a right to draw all reasonable inference and conclusions

from the testimony before them and apply it to the facts in the case.

In the case at bar we have an infant, who when taken in hand by the physician was suffering with what is said to have been bronchial pneumonia. The defendant operated on him and treated him for that and according to the defendant the infant was in a fair way of recovering his normal condition. In the further course of that treatment, however, the physician inserted a rubber tube, without securing it, and it slipped into the cavity of the body, lodged there and remained there until removed in the course of a third operation upon the body of the child and when removed was found to be coated over with foreign matter. During all the time of its presence, in fact from the time it dropped from sight, and, as subsequently proved, fell inside the body of the infant, the latter wasted away until he died. We do not believe that on such facts any jury would say that the acts of defendant did not constitute negligence, no matter how many expert professional gentlemen might have testified to the contrary. The defendant held himself out as a physician, undertook, for pay, the care and treatment of this little baby, and he owed it and its father careful and skillful treatment.

The demurrer of the defendant to the evidence was properly overruled.

Learned counsel for appellant attack the instructions given at the instance of plaintiff, claiming, among other things, that the first places too great a burden upon defendant, assumes negligence and places the burden of proof upon him to show that he was not, it being claimed that there was no evidence submitted to the jury upon which to base negligence in not discovering the tube inside the body of the child, and that the instruction allows the jury to speculate upon and find defendant negligent with respect to an operation upon the child in regard to which there is no allegation

in the petition. We do not think this instruction is susceptible of this criticism. It is a very long instruction and it is unnecessary to set it out, but we hold it was a fair presentation of the law of the case, as far as it went.

It is further urged that the second instruction given at the instance of plaintiff is erroneous as inconsistent with and contradictory to the first, and is too general, in that it permits a less amount of proof than a preponderance of evidence as a basis for plaintiff's recovery. We see no inconsistency between these instructions. If it was too general, that was an error of nondirection, not of misdirection, and should have been corrected by the instructions asked on behalf of defendant. Furthermore, the matter of preponderance of evidence was fully covered by an instruction given at the instance of defendant hereafter set out.

The third instruction, also challenged, and in fact the second instruction and part of the first given at the instance of plaintiff, are practically reproductions of the instructions given in *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675, as a comparison of these instructions with those given in that case shows. Of the instructions in *Wheeler v. Bowles* our Supreme Court said that it had "rarely found a fairer set of instructions in a negligence case."

At the instance of defendant the court gave instructions numbered 5, 6, 7 and 8, which in connection with the instructions given by the court for plaintiff, we think presented the case to the jury in a very fair way. This is particularly so of instruction numbered 7, given at the instance of defendant, which was to the effect that the plaintiff must show "by a preponderance of the testimony, that is, by the greater weight of the testimony to your reasonable satisfaction, that the death of the child was due to the leaving of the drainage tube in the body and the necessity for the other operations by reason of so leaving of said drainage

tube in the body, and not from any other cause; and if you find and believe from the testimony that the child died from any other cause than those mentioned in this instruction, your verdict will be for the defendant."

The court further told the jury in another instruction given (No. 8) at the instance of defendant, that defendant was not "responsible in damages to plaintiff for errors in judgment, or mere mistakes in matters of doubt or uncertainty, provided that he exercised and used, in the operation performed upon the child, and at which he assisted, such reasonable skill and care as is ordinarily exercised by those who practice under like conditions; and, if defendant did exercise such care and skill in connection with the use of the drainage tube mentioned in the petition, then plaintiff cannot recover against the defendant, and the burden is on the plaintiff, before he is entitled to recover against the defendant, to establish by the greater weight of the evidence that the defendant did not exercise such care and skill in the use of said drainage tube." We think that these instructions given at the instance of defendant, in connection with those given at the instance of plaintiff, cured the very points of objection defendant makes to the instructions given at the instance of plaintiff. With these instructions before it, which presumably, as they were asked by defendant, must be held to be based upon evidence in the case, we fail to find any error in the matter of instructions, or in the verdict.

The petition is attacked as fatally defective in that it does not allege specific grounds—acts—of negligence; does not set out how and in what manner the tube was negligently inserted in the body of the child, nor specifically state what means, treatment or operation could have been used or performed to discover the tube in the body. These are not defects—if such—which can be reached by demurrer. The petition is amply sufficient to sustain the verdict and judgment.

Wade v. William Barr Dry Goods Co.

This covers all the points that are argued in the brief of learned counsel for appellant. We confine our attention to their consideration.

Finding no reversible error, the judgment of the circuit court should be and is affirmed. *Nortoni* and *Allen, JJ.*, concur.

ERNEST H. WADE, Respondent, v. WILLIAM
BARR DRY GOODS COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted May 6, 1915.
Opinion Filed June 8, 1915.

MASTER AND SERVANT: Discharge of Servant: Acceptance of Gifts: Question for Jury. In an action by a buyer for a department store, who claimed that he had been wrongfully discharged before the end of his contract term, for salary for the balance of the term, defended on the ground that he had accepted gifts and gratuities from a firm with whom he, from time to time, negotiated purchases on behalf of the store, the evidence tended to prove that such gifts, all of which were given at Christmas, came to plaintiff unexpectedly and without solicitation, and were more or less business or social courtesies arising out of the social relations between plaintiff and his wife and the officers of the firm, that they were of insignificant value as compared with the amount of the purchases from the firm, that plaintiff's orders practically confined him to buying from that firm, and that defendant's general manager was so well satisfied with plaintiff's success in his purchases that he made plaintiff a present of substantial value. *Held*, that it was a question for the jury whether the receipt of such gifts had a tendency to corrupt plaintiff and turn him from the loyalty he owed to his employer, and that the gifts did not, as a matter of law, have that tendency, especially as defendant made an issue of fact as to such question, by alleging in its answer that the acceptance of the presents without defendant's knowledge was sufficient to justify an employer, acting reasonably, to lose the confidence required and contemplated by the nature of the relation, and constituted a breach of the contract of employment.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Nagel & Kirby for appellant.

(1) The standard of conduct required of an agent exercising discretionary powers in dealing with persons opposed in interest to his employer, is that he shall not voluntarily place himself in a position where he will be tempted not to do his best for the protection of the interests confided to him. The basis of this rule is not the effect of the particular act of the agent, but the tendency of acts of that character to impair the free exercise of his discretionary powers for the sole benefit of his principal. *Eunau v. Rieger*, 105 Mo. 549; *Mechem on Agency* (2 Ed.), sec. 1189; *Robertson v. Chapman*, 152 U. S. 673. (2) An agent entrusted with discretionary powers, who accepts gratuities of substantial pecuniary value from parties with whom he regularly deals in the exercise of those powers, without the knowledge or consent of his principal, has voluntarily placed himself in such a position, and has justified the termination of the confidential relation existing between himself and his principal.

David Goldsmith and *M. N. Sale* for respondent.

(1) Both of the contentions now made by the appellant were urged upon the former appeal of this case. It was contended by the present appellant upon that appeal both that the defendant was entitled to a peremptory instruction in its favor, and that it is ground for the discharge of a servant that he has voluntarily placed himself in a position where he will be tempted not to do his best for the protection of the interest confided to him. The evidence now adduced is no stronger (indeed, it is weaker) in favor of the appellant than it was on the former appeal. Not a single incident has been shown at the last trial which was not established

at the first trial. Under the circumstances the opinion of this court on the former appeal is *res adjudicata* upon both of the present contentions of the appellant. *Barrie v. Transit Co.*, 119 Mo. App. 38; *Rigsby v. Supply Co.*, 130 Mo. App. 128; *Tansey v. Railroad*, 186 Mo. 269. (2) As instances in which courts have refused to sustain the right of the master, as a matter of law, to discharge the servant, under conditions in which the master would have been warranted in losing confidence in the servant, and also under conditions in which the servant might have been subjected to temptation, we refer to the following: *Child v. Mfg. Co.*, 175 Mass. 493; *Brownell v. Erich*, 43 App. Div., N. Y. Sup. Ct. 369; *Carpenter Steel Co. v. Norcross*, 204 Fed. 537.

REYNOLDS, P. J.—Action for damages for breach of contract of employment.

Alleging in his petition the contract of employment of plaintiff by defendant for a term of one year to end January 1, 1909, performance by plaintiff and discharge without just cause before the end of the term, plaintiff demands judgment for damages sustained.

In its answer, upon which the case was tried, defendant admits the employment of plaintiff as buyer; denies that plaintiff duly performed his duties under the contract; admits he was discharged on July 11, 1908, but denies he was so discharged without just cause. Averring that, beginning with the year 1903, plaintiff had continuously been in the employ of defendant as buyer, and that the contract sued on was a renewal of prior contracts, it is averred that it was the duty and within the power of plaintiff under his employment, to represent and act for defendant in purchasing, at the terms and in the manner most advantageous to the defendant, goods, such as toys and the like, required for his department, and that the amount and character of goods to be purchased, the selecting of the dealers from whom they should be purchased,

and the protection of the interests of defendant in all matters relating to the purchase of goods for that department was under his employment, confided and entrusted to the discretion and determination of plaintiff, and averring that the nature of his employment required that defendant should entertain entire confidence that plaintiff would exercise the discretionary powers and duties so confided to him, uninfluenced by any considerations except the best interest of his employer, it is charged that during his employment plaintiff from time to time received and accepted, without the knowledge or consent of defendant, "gifts and gratuities of substantial value from Hamburger & Company, with whom plaintiff was from time to time negotiating purchases on behalf of defendant; that the acceptance and receipt of said presents and gratuities by plaintiff without defendant's knowledge or consent, tended to impair the free exercise for defendant's benefit of the discretionary powers so confided and entrusted to plaintiff, was destructive and in violation of the confidence and trust reposed in plaintiff by defendant under said employment; was sufficient to justify a reasonable person occupying the position of defendant as plaintiff's employer, acting reasonably, to lose the confidence required and contemplated by the nature of the relation between them, and constituted a breach of the contract of employment by the plaintiff.

A general denial of the new matter pleaded was filed in reply.

The case was tried to the court and a jury and from a verdict and judgment for plaintiff, defendant has appealed.

This is the second appeal by defendant. See *Wade v. Wm. Barr Dry Goods Co.*, 155 Mo. App. 405, 134 S. W. 1084, for statement and opinion on the former appeal.

The facts in evidence at this second trial follow very closely on the lines of the first trial, with some

additional evidence at this second trial. As in the first trial it appeared that the presents made to plaintiff and his wife by persons connected with Hamburger & Company were Christmas presents; that they consisted of a box of cigars and jewelry, running in value from \$2.50 to \$20. Two of the gifts, a necklace for his wife, value not above \$20, and pair of sleeve buttons for himself, worth about \$15, followed plaintiff's acts in assisting a buyer for Hamburger & Company, who was in St. Louis and fell into some trouble. Plaintiff took care of him and furnished him money with which to go home. The presents came the following Christmas.

Plaintiff admitted that after he had ceased buying from Hamburger & Company he received no more presents from them, but explained that Hamburger & Company had gone out of business, Mr. Hamburger and his wife going to Europe, sending him and his wife Christmas cards from there.

In this latter trial it was in evidence that plaintiff's purchases of the lines of goods in which Hamburger & Company dealt, including toys, averaged from fifty to sixty thousand dollars a year. The smallest purchase from Hamburger & Company in any one year that plaintiff was in the employ of defendant was something less than \$6000 for toys, but the general average for toys had been from ten to twelve thousand dollars a year. It was also in evidence at this latter trial that one Allen, the general manager for defendant, presented plaintiff, shortly after Christmas of 1907, which was the time when he had been presented with cuff buttons, and his wife with a necklace by the Hamburgers, with a tailor-made suit of clothes because the season's sale of toys by defendant that year, and which plaintiff had purchased for defendant from the Hamburger Company, had far exceeded the expectations of defendant. In this as in the former trial the evidence conflicted as to whether plaintiff had paid excessive prices for the toys included in his last purchase.

To meet the claim of defendant that plaintiff failed in his duty to defendant in that he had not called on another firm before his purchase from Hamburger & Company, at this trial plaintiff introduced evidence tending to show that Borgfeldt & Company and Hamburger & Company were the principal dealers in New York in toys and knickknacks of the quality and line required by defendant in its store; that while there was another large dealer in toys there named Illfelder, that concern did not sell to department stores such as that of defendant; that it had been the constant practice of defendant to purchase substantially all of its toys from Hamburger & Company, not only during the whole time plaintiff was in defendant's employ but for many years prior to that employment. It was also in evidence that when plaintiff first went to New York to purchase goods for defendant, Mr. William Barr, who was at that time the head of the defendant concern, had told him that he wished him to be careful in the character of toys he bought for their business and that he did not wish him to buy any from the Illfelder concern, "because they don't have the character of toys in keeping with our business; their goods are for a cheaper line of retail business."

At this last trial plaintiff asked no instructions except one as to the measure of damages which is not criticised.

Defendant asked an instruction that plaintiff was not entitled to recover, which the court refused.

It also asked two other instructions, which the court refused, defendant excepting. We do not set these out here as counsel for appellant, in their assignment of error, have given the substance of them.

At the instance of defendant the court instructed the jury to the effect that if they believed from the evidence that plaintiff was in the employ of defendant as buyer from April, 1903, until July, 1908, and if they believed from the evidence "that it was a part of his

duty as such buyer to represent and act for defendant in making purchases from time to time of the requirements of the toy department of defendant's business, and to exercise his judgment and discretion for the benefit of his employer in dealing with those from whom such purchases were made; that while so employed as such buyer, plaintiff, without the knowledge or consent of defendant, accepted and received from Hamburger & Company, with whom he had negotiated and was about to negotiate purchases in behalf of his employer, gifts or presents of substantial value; and if you believe that the receipt and acceptance by plaintiff of such gifts under the facts and circumstances shown in evidence would be sufficient to justify a reasonable person occupying the position of defendant as plaintiff's employer, and acting reasonably, to lose confidence that plaintiff would exercise the discretionary powers and duties so confided to him, uninfluenced by any considerations except the best interests of the employer, then the acceptance and receipt of such presents constituted a breach by the plaintiff of his contract of employment, and your verdict will be for defendant; and unless you so find for the defendant your verdict will be for the plaintiff."

Beyond the usual instruction as to the number of jurors necessary to concur in a verdict, these are all the instructions asked or given.

The assignments of error are, first, that the court erred in refusing to give the peremptory instruction requested by defendant that upon all the evidence plaintiff was not entitled to recover; second, that the court erred in refusing to instruct the jury as requested by defendant that if plaintiff, by accepting presents from Hamburger & Company voluntarily placed himself in a position where he would be tempted not to do his best in protecting the interests of his employer, such conduct was in violation of the confidence reposed in him and justified his discharge.

The first assignment, involving the action of the trial court in overruling the demurrer to the evidence, is untenable unless we are to hold, as a matter of law, and on the theory advanced by learned counsel for appellant in their second assignment, that plaintiff, respondent here, could not and should not recover.

This brings us to a consideration of this second assignment, which counsel in their argument here put thus: "Can an agent, entrusted with discretionary power in the purchasing of goods for his principal's account, accept, without his principal's knowledge and consent, presents or gratuities of substantial value consistently with the confidence reposed in him?" Answering this in the negative, it is argued by those counsel that upon the admitted facts plaintiff was not entitled to recover.

An examination of the brief of counsel for plaintiff, as it appears in the report of the case on the former appeal (p. 406), shows that this last proposition is practically the same which was urged by those counsel on that appeal, and is sought to be supported by practically the same authorities then cited by them.

In the opinion in that case we said (l. c. 408), after noting that the evidence tended to prove that the presents in question came to plaintiff unexpectedly and without solicitation and were more or less business or social courtesies arising out of the social relations of plaintiff and his wife and the officers of Hamburger & Company, reciprocated by plaintiff and his wife: "The evidence on behalf of the plaintiff further tended to prove that neither the friendly social relations mentioned, nor the presents received by him, in the slightest degree influenced him in his capacity as a buyer or caused him to buy from Hamburger & Company, or to give them any advantage in price or otherwise or to falter in unswerving loyalty to his employer and devotion to its interests."

At this last trial evidence of like character was again given, fortified, as we have stated, by additional evidence, some of it showing the very insignificant value of the presents as compared with the amount of the purchases, all given at Christmas; other of it showing that plaintiff had been directed by Mr. Barr not to purchase of a particular firm—which firm excluded, practically confined him to Hamburger & Company; and other to the effect that Allen, the manager of defendant firm, was so well satisfied with the success of plaintiff in his purchases that he made him a present of substantial value.

Taking up the proposition of counsel, we are not prepared to hold with defendant, as a matter of law, that the mere receipt by plaintiff of these gifts, establishes his breach of trust and was not open to explanation. Admit the fiduciary character of the trust imposed by the employment; admit the receipt of the gifts, it would seem that to warrant the discharge of an employee it should appear that the gifts were made for the purpose of influencing the employee in respect of matters within the scope of his functions (1 Labatt's Master & Servant (2 Ed.), sub. div. C, sec. 279, pp. 852 and 853), leaving out of consideration all question as to whether they had in fact influenced him. Mr. Labatt cites no cases under this paragraph, but refers to chapter 1897, Laws of Pennsylvania, which impose a penalty upon designated officers of mines who receive or solicit money from employees for the purpose of continuing them in the employment or procuring employment for them. Two sections of the Laws of Rhode Island of 1905 (now sections 21 and 22, p. 1287, Compiled Laws of 1909), are also quoted. These make it a misdemeanor for any agent in public or private employ or public office to "corruptly accept, or obtain or agree to accept, or attempt to obtain from any person, for himself or for any other person, any gift," etc., "for doing or forbearing to do," etc., any act in rela-

tion to the business of his principal or employer. Necessarily, under either the Pennsylvania or Rhode Island law a corrupt motive would be of the essence of the offense. But it seems to us that the controlling thought in this observation of the text-writer, namely, that the gift was "offered for the purpose of influencing him (the employee) in respect of matters within the scope of his functions," is a correct statement of the law, as far as it goes.

Counsel for appellant invoke the rule applied to trustees, as illustrated in *Keech v. Sandford*, 1 White & Tudor's Lead. Cases in Equity, part 1, p. *58, commonly called the Rumford Market case, a case wherein the doctrine of constructive trusts was applied—a case in equity in which it was held that a trustee could not derive personal benefit from his trusteeship. The principle underlying the decision in this case has been applied in every case of like character that has been before the courts of chancery, the rule being so rigidly applied that the trustee is not allowed to show good motives or that no damage to his *cestui qui trust* results from his act. But we are to remember that while much is said in these cases upon the duty of fidelity and loyalty on the part of the agent or trustee, that the courts were themselves passing upon the facts. We are referred to no case in which it has been held that the rule is to be applied without consideration of all the facts in the case. It is true that Mr. Mechem (1 Mechem on Agency (2 Ed.), secs. 1188 to 1191) states the rule as to faithfulness of a trustee or agent very strongly and refers to the trustees as agents, but his cited cases are, almost without exception, cases in equity; in none of them are the facts present as here.

In the case at bar the crucial point is, were certain gifts made to the agent by reason of his agency and made to influence him on the line of his agency, and would reasonable men, passing on the acceptance of these gifts, say that the giving and receipt of them

had a tendency to corrupt plaintiff and turn him from the loyalty he owed his employer? That latter was a question of fact for the determination of the jury. That was the very issue tendered by the answer, which averred that the acceptance of the presents by plaintiff, without the knowledge of defendant, "was sufficient to justify a reasonable person occupying the position of defendant as plaintiff's employer, acting reasonably, to lose the confidence required and contemplated by the nature of the relation between them, and constituted a breach of the contract of employment." Defendant itself made this issue, made it an issue of fact.

The jury had the evidence of the whole transaction before them, the amount of the gifts, the amount of the dealings of plaintiff with those from whom he purchased for defendant, as well as the times when and circumstances under which they were given. They were all given at Yuletide; were Christmas gifts; given at the time when all the world is full of charity and goodwill; when, as we are told, even soldiers in opposing trenches and in deadly struggle, stop and make gifts. Who would say that in such acts these soldiers were disloyal to their cause. All the facts being present, as here, the issue tendered as here, in an action at law, as here, it was for the jury to say whether, on these facts, they, "as reasonable men," "acting reasonably," would say the gifts were "substantial gifts" and were bribes; whether under color of gifts at such a time and of such character, a corrupt, a corrupting motive lay back of their giving or receipt. We decline to here say, as a matter of law, that on the evidence, the receipt of such gifts, under like circumstances, are to be conclusively held to be acts justifying the discharge of the agent. In brief, we hold that on its facts and issues made, this was a case for the jury. In that view we see no reason to change our holding on this point as set out in the former opinion in this case.

Discovering no error to the manifest prejudice of the defendant in this last trial, the judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

SOPHIA THOMURE, Respondent, v. ST. LOUIS &
SAN FRANCISCO RAILROAD COMPANY,
Appellant.

St. Louis Court of Appeals. Submitted on Briefs May 6, 1915.
Opinion Filed June 8, 1915.

1. **CARRIERS OF PASSENGERS: Injury to Passenger: Premature Start of Railroad Train: Sufficiency of Evidence.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, *held*, under the evidence, that the case was for the jury.
2. **INSTRUCTIONS: Necessity of Being Supported by Evidence.** It is error to submit issues to the jury when there is no evidence to support them.
3. **CARRIERS OF PASSENGERS: Injury to Passenger: Premature Start of Railroad Train: Evidence: Inferences.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, plaintiff's testimony, that the starting of the train caused her to lose her balance and fall from the step, was sufficient to warrant an inference that the train was caused to start and move forward suddenly.
4. **———: ———: ———: Right of Recovery.** Where the conductor of a railroad train, having reason to believe that a passenger who has reached his destination has not alighted, and, though dilatory, may be in the act of alighting, starts the train without examination or inquiry, and the passenger is in the act of alighting when the train is started, and is thereby injured, the railroad company is liable.
5. **———: ———: ———: Instructions: Submission of Immaterial Issues.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, *held* that the real point to be determined was whether plaintiff had been

Thomure v. St. Louis & San Francisco Railroad.

allowed a reasonable time in which to alight from the train, and as that was submitted to the jury and they found for plaintiff, whether or not other averments in her petition, or even included in the instructions, were supported by substantial evidence, was immaterial.

6. ———: ———: ———: Instructions. In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, the court instructed, at the instance of plaintiff, that if the jury believed from the evidence that plaintiff was a passenger on defendant's train, having paid her fare, "then in that event it was the duty of defendant to exercise the highest practical care to carry plaintiff safely to her destination, and it was the duty of defendant's agents and servants to stop the train at plaintiff's destination a reasonable time to allow plaintiff, by the exercise of ordinary care, to alight from said train in safety before it started; and in ascertaining what would be a reasonable time, the jury should consider plaintiff's age, sex, physical condition and all the facts and circumstances bearing upon the question; and if defendant's agents and servants started said train while plaintiff was proceeding, in the exercise of ordinary care, to alight from said train, and before she had a reasonable time to alight therefrom in safety, then such starting of said train was an act of negligence on the part of defendant and a breach of its duty to plaintiff as a passenger on its road." *Held*, that the instruction properly covered the case.

7. ———: ———: ———: Instructions. In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, the petition alleged that, before the train had stopped for a reasonable and sufficient length of time to allow plaintiff, using due diligence, to alight therefrom in safety, and while plaintiff was in the act of alighting therefrom, defendant, by or through its agents, negligently caused the train to be started forward with a sudden jerk, without any warning, thereby causing plaintiff to be thrown to the ground. *Held*, that an instruction requested by defendant, to the effect that if the jury found that the train stopped a reasonable length of time for plaintiff to alight, and that the train was started while she was in the act of alighting therefrom, and started and moved slowly, and did not start with a sudden jerk and bound, and she was caused to fall by reason of the starting, the verdict should be for defendant, was properly refused, since its effect would have been to narrow the issue to the fact of a start with "a sudden jerk and bound," and to eliminate the real issue, namely, whether or not the train was started before a reasonable time

had been allowed plaintiff to alight—the manner in which the train was started, whether with a jerk or otherwise, being immaterial.

8. ———: ———: ———: Evidence: Admission: Harmless Error. In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, the admission of evidence that there was no step-box at the steps when plaintiff attempted to alight, was not reversible error, where defendant's own testimony showed that the box had been removed before plaintiff attempted to alight and no instructions basing liability on the absence of the box were given.
9. APPELLATE PRACTICE: Admission of Evidence: Harmless Error. The admission of evidence concerning facts that cannot be made the predicate of liability is not prejudicial error, where the adverse party establishes the same facts and the jury are not charged that they may base a verdict thereon.
10. EVIDENCE: Statement Prepared by Witness: Admissibility. A written statement, prepared by defendant's claim agent, setting forth plaintiff's version of the matter in controversy, as detailed by her to the claim agent, but which was not signed by her, was properly excluded from evidence; the claim agent having testified concerning what plaintiff told him.
11. DAMAGES: Personal Injury: Punitive Damages. In an action for personal injuries negligently inflicted, the law will confine the recovery to compensatory damages, and will not allow those that are punitive in their nature.
12. ———: ———: Excessiveness of Recovery. Plaintiff, a woman fifty years of age, had both bones of one of her legs broken below the knee. The evidence tended to show that, although the injury would not be permanent, it would trouble her for a long time and that she would not be able to walk without crutches for a long time. *Held*, that a verdict for \$3000 was not excessive.

Appeal from Jefferson Circuit Court.—*Hon. E. M. Dearing*, Judge.

AFFIRMED.

W. J. Orr, Moses Whybark and A. P. Stewart for appellant; *W. F. Evans* of counsel.

(1) The court erred in overruling the demurrer to the evidence at the close of plaintiff's case, and in

refusing the peremptory instruction requested by defendant at the close of the whole case. The petition charged specific acts of negligence, and plaintiff therefore cannot invoke the doctrine *res ipsa loquitur*. *McGrath v. Trans. Co.*, 197 Mo. 105; *Orcutt v. Bldg. Co.*, 201 Mo. 442, 444; *Roscoe v. Railroad*, 202 Mo. 576; *Beave v. Trans. Co.*, 212 Mo. 331; *Evans v. Railroad*, 222 Mo. 435; *Hamilton v. Railroad*, 114 Mo. App. 508; *Gibler v. Railroad*, 148 Mo. App. 475. (2) Instruction number 3 given for plaintiff is erroneous because there was no evidence that the train was caused to start and move suddenly forward. It is error to submit to the jury issues which have no evidence to support them. *Kimble v. Railroad*, 108 Mo. App. 78; *Groneweg v. Estes*, 144 Mo. 427; *Smith v. Bank*, 147 Mo. App. 462; *Heinzle v. Railroad*, 182 Mo. 528; *Black v. Railroad*, 217 Mo. 685; *Degonia v. Railroad*, 224 Mo. 589. (3) Instruction number 3 requested by defendant should have been given. (4) The court erred in admitting testimony that no step box was placed at the steps where plaintiff was attempting to alight from the train. There was no duty resting on defendant to furnish plaintiff a portable step. *Young v. Railroad*, 93 Mo. App. 267. (5) The court erred in excluding the statement made by plaintiff to defendant's claim agent. This statement was competent to contradict plaintiff, and its weight was for the jury. *Kirkwood, etc., Assn. v. Van Ness*, 61 Mo. App. 364; *Erwin v. Railroad*, 94 Mo. App. 297. (6) The verdict is excessive.

Clyde Williams and *R. A. Frazier* for respondent.

(1) Defendant did not stop its train a reasonable and sufficient length of time to enable plaintiff using due diligence to alight therefrom. *Gress v. Railroad*, 109 Mo. App. 716; *Kirby v. Railroad*, 146 Mo. App. 304; *Hurt v. Railroad*, 94 Mo. 255; *Hickman v. Rail-*

road, 91 Mo. 436. (2) Defendant's agents and servants caused its train to start while plaintiff was in the act of alighting therefrom, which fact was known to said agents and servants or should have been known. *Straus v. Railroad*, 86 Mo. 421; *Straus v. Railroad*, 75 Mo. 185; *Nelson v. Railroad*, 113 Mo. App. 707. (3) The court did not err in the admission or exclusion of testimony and the verdict is not excessive.

REYNOLDS, P. J.—Respondent here, plaintiff below, on the morning of February 26, 1913, boarded a train of the defendant at St. Mary's, intending to go to Horine, a station on the line of the road of the defendant, paying her fare and obtaining a ticket, which the conductor of the train took up during the course of the journey. She seated herself in one of the passenger coaches of the train, about the third seat from the front end of the coach. When the train approached Horine station, the porter called out the name of the station as the next stop, and when the train stopped, the porter again called the station, went out on the front platform, which was the ordinary vestibule platform, raised the covering that was over the steps, took his step or footstool and placed it on the ground or on the platform at the foot of the car steps, the lower step of the car being about twenty-two inches from the level of the platform at the station. He stood there about one minute, he says. The conductor, who had been sitting in the rear of the same car in which plaintiff was seated, got up, called the station, went out of the rear of the car and stood by it on the station platform, when he ordered the porter to go forward and assist the freight agent in loading three cans of milk into one of the baggage cars, and also to assist in loading into that car a calf, which had been tied near the track. There were four cars in the train, two baggage cars, a smoker and a coach. Before going forward to attend to this the porter put his stool back

on the vestibule, and he testified that the door of the car was closed and no one was on its platform or steps. He says it took him about one minute to assist in loading the milk cans and calf. After assisting the agent in loading these, the porter signalled to the conductor to that effect, and the train, on the signal of the conductor, pulled out from the station, having stopped, as the porter said, "not less than two minutes." Plaintiff, as soon as the train had stopped, got up from her seat, picked up her bundles and went out on the front vestibule of the car in which she was riding and looked around, as she said, to see if there was anyone there to help her down. She was a woman about fifty-two years of age, and rather heavy. She neither saw anyone around to help her, nor did she see any stool at the foot of the car step, but she got down to the lower step of the car, went to step off, and the train started and threw her off and on to the ground. A young man called by plaintiff, and who was present, testified that he saw the porter go ahead and help load the calf and that after that was loaded the signal was given to the engineer to go ahead, and as he was looking at the moving train he "saw the plaintiff fall forward. The train hadn't moved more than three feet before she landed on the platform. . . . I saw her fall off, but I can't swear whether she jumped or was thrown off by the movement of the train," he said. The result of her fall was that two bones in plaintiff's right leg were broken a short distance below the knee. She was lifted up and carried into the station by the station agent and a bystander, subsequently carried over to the town of Victoria in a vehicle, and from there taken to her home, where on the evening of that day the fractured bones were set by an attending surgeon and the limb bandaged and afterwards put into a Hodgen splint. She was confined to her bed something like six weeks and at the time of the trial, which took place on

June 10, 1913, as we understand from the testimony, was still using crutches or a crutch.

The surgeon who had attended her in the first instance, testifying for plaintiff, said that while her leg was still swollen a good deal some two or three weeks before the day of the trial, which was the last time he had examined her, and while she was not then able to use the limb without the aid of a crutch and was walking with crutches, he did not think there would be a permanent injury, but that it would be quite a long while, considering the age and weight of plaintiff, before she could walk without crutches; that in the course of time he thought her limb would be as good as ever.

The other attending surgeon, as had the former, testified that there was no shortening of the limb; that in his opinion it would be a good while before plaintiff would be able to use the limb, taking into consideration the fact that she was a very large woman and considering her age; that if she were younger she would probably recover faster, but that he would not like to give an opinion as to the permanency of the stiffness of the knee, and thought that plaintiff would have to use crutches six months longer, and that the leg would give her trouble for some time.

The conductor of the train, testifying on behalf of defendant, stated that he had seen plaintiff in the car on this train; had taken up her ticket and knew that her destination was Horine station and had not seen her get off at that station; had seen only one passenger, a man, get off there; knew nothing of the accident to plaintiff until some time afterwards.

The station agent testified that as the train was moving he noticed the plaintiff on the lowest step of the car platform and just as she got ready to step down "and she jumped forward and fell on her hands and knees."

There is no direct testimony in the case as to whether the train started slowly or with a jerk.

So much for the material evidence for both parties.

The petition avers that before the train had stopped "for a reasonable and sufficient length of time to enable the plaintiff, using due diligence, to alight therefrom in safety and while the plaintiff, in the exercise of ordinary care and with no fault on her part, was attempting to and in the act of alighting from the train, . . . the said defendant by and through its agents . . . in charge of and operating said train, negligently, carelessly and recklessly caused said train to be started forward with a sudden jerk and bound without the knowledge of or any warning whatever to the plaintiff, thereby causing plaintiff to be thrown and to fall with great force and violence from said car and train to the ground." Alleging her injuries and suffering, "plaintiff further states that the injuries aforesaid were directly caused by the carelessness and negligence of the agents, servants and employees of defendant in charge of and operating said train, in not being present at that part of defendant's train from which plaintiff alighted, to assist and enable plaintiff to alight in safety, in not stopping said train a sufficient length of time to permit plaintiff to alight therefrom in safety, and in causing said train to move forward suddenly while plaintiff was in the act of alighting therefrom and before she had fully left said train." Damages were asked in the sum of \$10,000.

The answer, after a general denial, pleaded contributory negligence. The reply was a general denial.

The trial resulted in a verdict in favor of plaintiff in the sum of \$3000, judgment following from which defendant has duly appealed.

The first error here assigned is to the action of the court in overruling a demurrer to the evidence at the close of the case, and in refusing to peremptorily instruct for defendant, it being argued that the petition charged specific acts of negligence, and plaintiff there-

fore cannot invoke the doctrine of *res ipsa loquitur*. We do not understand that plaintiff has invoked that doctrine and we see no indication of it in the instructions given by the court. On the evidence in the case we are of the opinion that the request for a peremptory instruction was properly refused.

The next assignment is that an instruction given for plaintiff is erroneous because there was no evidence that the train was caused to start and move suddenly forward, it being argued that it is error to submit to the jury issues which have no evidence to support them. The latter proposition admits of no denial; it is too firmly established in the jurisprudence of our State by frequent decisions of all of our appellate courts, to require citation of authority in its support. All the authorities cited by learned counsel for appellant under this second point are on that proposition. The objectionable words in the instruction complained of are those underscored in this instruction, which told the jury that to find for plaintiff, among other things, they must find, "that the agents and servants of defendant carelessly and negligently caused said train *to start and move suddenly forward* at a time when they knew or had reason to know that plaintiff had not alighted from said train." It is true that there is no direct evidence of the manner in which the train was started. Nor is there evidence that any warning of the intention to start was given to plaintiff or to any of the passengers by the conductor or any of the train crew. That the train did start is beyond question, and plaintiff's testimony is positive to the effect that the starting caused her to lose her balance and fall from the lower step of the car on to the ground. The jury having the right to draw all reasonable inferences from testimony before it, we think that this evidence was sufficient to warrant them in finding that this train had been caused to start and move suddenly forward.

But that is not the material point involved here. The real point on which liability must rest is, whether plaintiff was allowed a reasonable time to alight.

In *Straus v. Kansas City, St. J. & C. B. R. R. Co.*, 86 Mo. 421, it is held, affirming *Straus v. Kansas City, St. J. & C. B. R. R. Co.*, 75 Mo. 185, l. c. 429, and following and quoting from the case in 75 Mo., *supra*, that if a conductor "has reason to believe that any passenger who has reached his destination, has not alighted, and, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable."

In *Nelson v. Metropolitan St. Ry. Co.*, 113 Mo. App. 702, 88 S. W. 1119, commencing at page 707, it is said:

"A plaintiff will not be permitted to declare upon one cause of action and recover upon another. When acts of negligence, fundamental to the right asserted, are specifically alleged, they must be proven as alleged. . . . But this well-settled rule is in its application restricted by statute to predicative facts without proof of which the cause of action pleaded cannot be established in its full scope and meaning, and not to facts that, particularizing only, may be eliminated without changing the cause of action. . . . A fair and reasonable construction of the petition leads to the conclusion that the act of negligence charged was the starting of the train with sufficient force to destroy plaintiff's equilibrium while she, exercising due care, was in the act of leaving the car. The negligence of the gripman, if any, in the manner of moving the train was immaterial. It was negligent for defendant to make any kind of a start while passengers were leaving the train at a place provided for their discharge. The manner of starting the car, its rate of speed and jerking motion are but non-essential particulars. . . .

The relation of carrier and passenger continues to the time the latter alights from the train. It was not only the duty of defendant to safely carry plaintiff, but when her destination was reached and the car stopped, to hold it stationary while she was alighting. . . . As before stated, the gravamen of the charge is the starting of the car with plaintiff in the situation described. Actual knowledge on the part of the conductor of her position is beside the real issue. His act in starting the train was tortious, either with or without such knowledge if it, without fault of her's contributing, produced her fall. . . . Under these conclusions it follows that a failure of proof with respect to either of these facts and the omission to refer to them in the instructions as essential to a recovery do not constitute substantial error."

In Kirby v. St. Louis & San Francisco R. R. Co., 146 Mo. App. 304, 130 S. W. 69, Judge Cox, speaking for the Springfield Court of Appeals, has said (l. c. 310) considering the ground of negligence charged against the defendant:

"It seems to us that a fair interpretation of this charge fixes the gravamen of the charge as the failure to hold the train a sufficient length of time to permit plaintiff to alight therefrom. It clearly does make this charge and this was all that was necessary for plaintiff to charge and prove in order to make a prima-facie case against defendant. . . . The other allegations of the petition charging that the train was caused to move forward with a violent and sudden jerk, lurch and bound were unnecessary allegations, and we can see no reason why plaintiff, by reason of having made these allegations when they were entirely unnecessary, should be required to prove them before making a case sufficient to go to the jury when to prove the other allegation was of itself sufficient."

We think that what is said in these cases very applicable to the case at bar. The real point here to be

determined was whether the plaintiff had been allowed a reasonable time in which to alight from the train. That was submitted to the jury and if that was found for plaintiff, whether or not the other averments in her petition or even included in instructions were met by substantial evidence, is immaterial.

In an instruction, given at the instance of plaintiff, the court told the jury that if they believed and found from the evidence that plaintiff was a passenger on the defendant's train, having paid her fare, "then in that event it was the duty of defendant to exercise the highest practical care to carry plaintiff safely to her destination, and it was the duty of defendant's agents and servants to stop the train at plaintiff's destination a reasonable time to allow plaintiff, by the exercise of ordinary care, to alight from said train in safety before it was started; and in ascertaining what would be a reasonable time, the jury should consider plaintiff's age, sex, physical condition and all the facts and circumstances bearing upon the question; and if the defendant's agents and servants started said train while plaintiff was proceeding, in the exercise of ordinary care, to alight from said train, and before she had a reasonable time to alight therefrom in safety, then such starting of said train was an act of negligence on the part of defendant and a breach of its duty to plaintiff as a passenger on its road." No objection is made before us to this instruction, and this, on the authority of the cases cited above, covered the real point in the case and upon the determination of which the case hinged.

On the part of defendant the court gave an instruction covering this same proposition from defendant's standpoint, and, as we think, as favorable, indeed more favorable, than defendant was entitled to. We see no reversible error in giving the instruction on which error is here assigned.

The third error assigned is to the refusal of the court to give an instruction asked by defendant, to the effect that if the jury believed from the evidence "that the train on which plaintiff was a passenger stopped at the depot platform at the station of Horine a reasonable length of time for plaintiff to alight, and while she was on the steps of the car in the act of alighting therefrom, the train started and moved slowly, and did not start with a sudden jerk and bound, and she was by reason of such starting caused to fall from the same upon the station platform, and was injured, then under the issues in this cause she cannot recover, and your verdict must be for the defendant."

It is argued that this instruction was intended to meet the negligence pleaded in the petition, and the case as made by the evidence and that if it was proper to give the instruction for plaintiff which we have before quoted, then this instruction should have been given.

We think that this instruction asked by defendant was properly refused. It is sufficient to say of it that it attempted to narrow the issue down to the fact of the starting of the train, the effect of the instruction being that if it had not been proven that the train started with a sudden jerk and bound, plaintiff could not recover. As we have said, that is not the point in issue in this case. The effect of this instruction would have been to narrow the issue to the fact of a start with "a sudden jerk and bound," and to eliminate the real issue which, as we have stated is: Was this train started before a reasonable time had been allowed plaintiff to alight? If it was so started, the manner of its starting, whether slow or fast, suddenly and with a jerk, or smoothly, is utterly immaterial. [Kirby v. Railroad, supra.]

The fourth error assigned is to the admission of testimony that no step box was placed at the steps when plaintiff was attempting to alight from the train.

It is true that in *Young v. Missouri Pacific Ry. Co.*, 93 Mo. App. 267, l. c. 274, it is said that there is no law requiring the defendant to furnish portable steps for the use of its passengers in entering or leaving any of its cars. We do not think, however, that the admission of this testimony was reversible error, particularly as it appeared, in defendant's own evidence, that in point of fact this step box had been placed in front and below the steps by the porter when the train first stopped, and that he had removed it when he went forward to assist in loading express matter on the car. So beyond question there was no step there at the time plaintiff was attempting to alight. No instructions given in the case makes the absence of this step a ground of liability.

The fifth point made is that the court erred in excluding a written statement said to have been made by plaintiff to defendant's claim agent. It appears that a claim agent of defendant called on plaintiff after she was injured and wrote out what she said of its happening. Asking plaintiff to sign it, she refused because her attorney had advised her to sign no papers in the case. The only authorities cited in support of this offer by learned counsel for appellant are *Kirkwood Gymnasium & Armory Hall Assn. v. Van Ness*, 61 Mo. App. 361, l. c. 363, and *Erwin v. Kansas City, Fort Scott & Memphis Ry. Co.*, 94 Mo. App. 289, l. c. 297, 68 S. W. 88. We are unable to find any support for counsel's proposition in either of these cases. The claim agent who wrote out this statement was a witness on the stand and gave his account of his conversation with plaintiff, so that was before the jury. The paper was not needed or used as a matter of refreshing the memory of the witnesses. At most, it was a corroboration by the witness of his own testimony, made out by himself, not signed by plaintiff, and hence properly excluded.

The sixth and final point is that the verdict is excessive. It is true, as said by our Supreme Court in *Hurt v. St. Louis, I. Mt. & S. Ry. Co.*, 94 Mo. 255, l. c. 265, 7 S. W. 1, that in cases of this kind, where there are no circumstances of aggravation, "the law will confine the recovery to compensatory damages, and will not allow those which are punitive in their nature." When we consider the evidence in this case as to the age of the plaintiff, the extent of her injury, the time which she has suffered and the time that she necessarily must continue to feel the effects of it, although it may be true that in the course of time those effects will have worn off, and although the injury may not be in that sense permanent in its character, we are not prepared to say that the amount of the verdict is so excessive as to indicate prejudice or passion on the part of the jury. The matter of the estimation of damages in cases of this character is so entirely within the discretion of the jury, in the first instance, then by the trial court, that we, as an appellate tribunal, do not feel warranted in here interfering.

Finding no reversible error to the prejudice of the defendant, the judgment of the circuit court should be and is affirmed. *Norton* and *Allen, JJ.*, concur.

W. P. HANNA, Appellant, v. J. H. BUFORD,
Respondent.

St. Louis Court of Appeals. Argued and Submitted May 7, 1915.
Opinion Filed June 8, 1915.

1. **CONVEYANCES: Contradicting Recitals: Parol Evidence.** In an action for the value of timber cut and removed by defendant from plaintiff's land, evidence by defendant, that he understood that a quitclaim deed, by which plaintiff quitclaimed the standing timber to him, with the privilege of entry and removal

Hanna v. Buford.

for six years, gave him six years to remove the timber, not from the date of the deed, "but when he got ready," was incompetent.

2. ———: Quitclaim Deed to Timber: Construction: Time for Removal of Timber. A deed quitclaiming the standing timber on the land described, with the privilege of entry and removal for six years, passed title to the timber, defeasible as to such of it as was not removed by the grantee within that time, without any reasonable time beyond that time; so that, where the grantee entered and removed timber after such period, he was liable to the seller for its value, and the defense that he entered within a "reasonable time" after the expiration of the six-year period was unavailing.

Appeal from Reynolds Circuit Court.—*Hon. E. M. Dearing*, Judge.

REVERSED AND REMANDED.

J. H. Keith for appellant.

(1) The court committed error in allowing defendant, J. H. Buford, to testify that he thought he had six years to cut and remove the timber from appellant's land beginning at any time he desired. 21 Am. & Eng. Ency. of Law (2 Ed.), 1078 and 1113. (2) There can be no question but that the meaning of the removal clause in the deed of conveyance means that the timber must be removed within six years, and that from the date of the conveyance. To construe it otherwise would be against the great weight of authority in this country. 28 Am. & Eng. Ency. of Law (2 Ed.), 541; *McRae v. Stillwell*, 111 Ga. 71; *Saltonstall v. Little*, 90 Pa. St. 422; *Bunch v. Lumber Co.*, 134 N. C. 116; *Haskell v. Ayers*, 32 Mich. 93; *Wasey v. Mahoney*, 55 Mich. 194; *Pease v. Gibson*, 6 Me. 81; *Williams v. Flood*, 63 Mich. 487; *McCumber v. Railroad*, 108 Mich. 471; *Fletcher v. Livingston*, 153 Mass. 388; *McIntyre v. Barnard*, 1 Sandf. Ch. (N. Y.) 52, following *Pease v. Gibson*, 6 Me. 81; *White v. Foster*, 102 Mass. 375; *Moring v. Ward*, 50 N. C. 273; *Hubbard v. Barton*, 75 Mo. 65; *Hounshell v. Miller* (Ky.), 155 S.

W. 1148; Houston Oil Co. of Texas v. Hamilton, 153 S. W. (Tex.) 1194; Golden v. Glock, 57 Wis. 118; Judivine v. Goodrich, 35 Vt. 19; Garden City etc., Co. v. Sims, 84 Ark. 603; and Co. v. Adams, 54 Fla. 550; St. Louis Cypress Co. v. Thibodaux, 120 La. 834; Hawkins. v. Lumber Co., 139 N. C. 162.

Carter M. Buford, Arthur T. Brewster and J. B. Daniel for respondent.

(1) If a deed admits of more than one construction it must be most strongly construed against the grantor. Healy v. Everitt & Cherry V. T. Co., 139 Pac. 609; Bray v. Conrad, 101 Mo. 331; Bernero v. McFarland, 134 Mo. App. 290; Devlin on Real Estate (3 Ed.), sec. 843a. (2) If it be doubted whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction. 4 Kant's Com. 132; Palmer's Ex'r v. Ryan, 63 Vt. 227; De Goosh v. Bladwin & Russ, 82 A. 182 (N. H.); 2 Devlin on Deeds (3 Ed.), sec. 970; Zimmerman v. Daffin, 42 So. 861; Elyton Land Co. v. Railroad, 100 Ala. 396; Rawson v. Inhabitanee, Etc. (Mass.), 7 Allen 125; Hoyt v. Kimball, 49 N. H. 322; Thornton v. Trammell, 39 Ga. 202; Devlin on Real Estate (3 Ed.), sec. 970; Stilwell v. Railroad, 39 Mo. App. 221; Studdard v. Wells, 120 Mo. 25; Gratz v. Railroad 165 Mo. 221; Reynolds v. Reynolds, 234 Mo. 144; Hayden v. Railroad 222 Mo. 126. (3) The law abhors a forfeiture. If the language of an instrument is susceptible of two constructions, one of which will work a forfeiture, while the other will not, courts will adopt that construction which will not work a forfeiture. Haydon v. Railroad, 222 Mo. 126; Reynolds v. Reynolds, 234 Mo. 144. (4) In construing a written instrument each and every part should be given effect if it can be done by fair intendment. Gilbert v. Waccamaw, 167 N. C. 786; Gaw v. Allen, 112 Mo. App. 711; Devlin on real Estate (3 Ed.), secs. 843a. 844a; McCul-

lock v. Holmes, 111 Mo. 445; Chew v. Kellar, 171 Mo. 215. (5) The deed under consideration passed an absolute title to the timber. Morgan v. Pott, 124 Mo. App. 371; De Goosh v. Baldwin & Russ (Vt.), 82 Atl. 182; Land Co. v. Watson, 129 Mo. App. 554; Huron Land Co. v. Davison, 131 Mich. 86; 28 Am. & Eng. Ency. of Law (2 Ed.), 541; Keystone Co. v. Brooks, 65 W. Va. 512; Halstead v. Jessup, 150 Ind. 87; Pierce v. Finerty, 76 N. H. 38; Hoit v. Stratton Mills, 54 N. H. 112; Irons v. Webb, 41 N. J. L. 203; Peterson v. Gibbs, 147 Cal. 6; Walker v. Johnson, 116 Ill. App. 147; Zimmerman v. Daffin, 149 Ala. 380; Green v. Bennett, 23 Mich. 470; Plumer v. Prescott, 43 N. H. 277; Dyer v. Hartshorn, 73 N. H. 509; Magnetic Ore Co. v. Marbury, 104 Ala. 465; Cawthon v. Stearns-Culver Lbr. Co., 60 Fla. 313; Mee v. Benedict, 98 Mich. 260; Wright v. Bentley Lbr. Co. (Ala. 1914), 65 So. 353; Vizard v. Robinson, 181 Ala. 349; Mt. Vernon Lbr. Co. v. Shepard, 180 Ala. 148; Goodson v. Stewart, 46 So. 239. (6) The words, "With the privilege of entering upon said land with men, wagons and teams for the purpose of cutting and removing said timber therefrom for a period of six years," grant a mere license to enter upon the land for a period of six years. They cannot be construed to be a stipulation, covenant or agreement to remove the timber within said time. Neither are they words of condition, forfeiture or reversion. Authorities, *supra*, point 5. (7) The court did not err in modifying the instruction offered by appellant, for the reason that the respondent was entitled to a reasonable time after the lapse of his license, also after notice, in which to enter and remove his timber. Green v. Bennett, 23 Mich. 470; Huron Land Co. v. Davison, 131 Mich. 86; Hoit v. Stratton Mills, 54 N. H. 109. (8) What is "a reasonable time" is always a question of fact for the jury, which fact they passed upon in this case and appellant is foreclosed thereby. (9) The burden of proof rested

upon appellant to show that the timber was not removed within a reasonable time. *Huron Land Co. v. Davison*, 131 Mich. 86. (10) Even if the court did err in modifying the instruction, the error was harmless. The timber belonged to the respondent and he is not sued for any other damage than the value thereof.

REYNOLDS, P. J.—This is an action which at common law would be called an action *de bonis asportatis*. By deed dated January 15, 1902, wherein plaintiff Hanna, a single man, is named as party of the first part, and the defendant Buford, as party of the second part, it is recited that “in consideration of the sum of \$190, to him paid by the said party of the second part, the receipt of which is hereby acknowledged,” the party of the first part does, “by these presents remise, release and forever quitclaim unto the said party of the second part, the timber on the following described lots (describing the land as in Reynolds county) with the privilege of entering upon said land with men, wagons and teams for the purpose of cutting and removing said timber therefrom for a period of six years. To have and to hold the same, with all the rights, immunities, privileges and appurtenances thereto belonging, unto the said party of the second part and his heirs and assigns forever; so that neither the said party of the first part, nor his heirs, nor any other person or persons for him or in his name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid timber, or any part thereof, but they and every of them shall by these presents be excluded and forever barred.”

This deed is the ordinary form of quitclaim deed in use in our State for the conveyance of land.

The defendant never entered upon the land nor cut any timber therefrom until the year 1912, that is, ten years after the execution of this deed and four years after the expiration of the six years limit in it, when in 1912 he entered upon the land and cut and removed

all the merchantable standing timber from it. Whereupon plaintiff brought this action for the value of the timber.

At a trial before the court and a jury there was a verdict and judgment for defendant, from which plaintiff has duly appealed.

The plaintiff asked the court to give an instruction to the effect that if they believed and found from the evidence that defendant, by himself or agents, and without the lawful authority of plaintiff, entered upon the land described during the year 1912, and then and there cut down timber standing and growing thereon and converted the same to his own use, the jury should find for plaintiff in such sum as they may believe and find from the evidence that the timber so taken is worth, not to exceed the sum of \$1440, the instruction proceeding "and the jury are further instructed that if you believe and find from the evidence in this case that the defendant purchased said timber from the plaintiff and removed the same within the time specified in the agreement with plaintiff, then and in that event you will find the issues for the defendant."

The court refused to give this instruction as asked but over the objection and exception of plaintiff inserted in the second clause of it the words "or within a reasonable time thereafter," so that that clause read "and removed the same within the time specified in the agreement with the plaintiff, *or within a reasonable time thereafter*, then and in that event you will find the issues for the defendant."

During the course of the trial defendant having been placed on the stand as a witness by plaintiff was asked on cross-examination by his counsel if he had cut any timber on the land before 1912. He answered that he had not. He was then asked to state to the court why he did not cut it sooner. This was objected to and, the objection being overruled, the witness answered that he had cut the timber when he had "got around in shape

to cut it." He was also asked and permitted to answer what his understanding was of the deed at the time he paid the money and received it as to when the timber was to be removed, and he answered that his understanding was that he had six years to remove the timber, not from the date of that instrument, but when he got ready; that he thought he had six years to cut and remove the timber. That question was also objected to and the objection overruled. Very clearly this was incompetent testimony and should not have been admitted and its admission would call for reversal.

Over and above that, however, and the real question in the case is as to the alteration made by the court in the instruction asked by plaintiff, by the court inserting the words "or within a reasonable time thereafter."

There is some diversity of opinion among the courts of the several States as to the effect of a deed of the kind before us. We have no Missouri decision directly in point. The one nearest to it is that of *Hubbard v. Burton*, 75 Mo. 65, an action in replevin. In that case the contract between the parties was evidenced by a memorandum in writing, under which the party of the first part agreed with the party of the second part that the party of the second part "may enter upon her land, being ninety acres of the farm of Gabriel Alexander, deceased, . . . and cut all of the white-oak, burr-oak, spanish-oak, elm and walnut that is upon said land, and remove said timber, within twelve months from this date," it being recited that the party of the second part had agreed to pay so much cash in hand and stipulated amounts at times following. The assignee of the vendee in the deed was plaintiff and the assignee of the vendor defendant, the latter refusing to allow the former to enter after expiration of the time named and remove timber cut within that time but not removed, whereupon the former brought replevin for the timber which had been cut but not re-

moved. Referring to the contract, Judge HENRY, who delivered the opinion of our Supreme Court, says (l. c. 67):

“The only question which it is necessary to determine relates to the proper construction of the contract between Miss Alexander and Jeffries (the vendee). ‘All of the timber not removed from said land within twelve months, whether cut or standing, is to be the property of the said Mary J. Alexander.’ We have no doubt that any trees standing, or felled, and lying in their natural state upon the land, after the expiration of twelve months from the date of the contract, would belong to the vendor.”

While this case is not exactly in point, we think its principle is here applicable. Looking at authorities elsewhere particularly to decisions by the courts of what we know to be the great timber States, we find that this decision of our Supreme Court is in line with the vast majority of them. So the prevailing rule is stated by the compiler of 47 Law Reports Ann. (N. S.), p. 883, annotating the case of *Wimbrow v. Morris*, 118 Md. 91, 84 Atl. 238, in which the contrary doctrine is held, that learned court holding that where a sale of timber is as a sale of chattels, the mere failure to remove from the land, within the time specified for ingress and egress, of logs which have been cut under a reservation of title, in a sale of the real estate, will not forfeit the title to the logs. The annotator, while giving this Maryland decision, says, in his notes to it:

“The general rule is that the sale of the timber on a certain tract of land to be removed within a given length of time is a sale of only so much timber as is cut and removed within that time; and in case of timber reserved in the grant of the land the grantor is entitled to take only so much timber as he may cut and remove within the time specified. It is to be observed that in some of these cases, the view is taken that the

title did not pass, while the majority take the view that although the title passed, it was subject to defeasance by failure to remove the timber within the time specified. This rule has been held, either expressly or by implication, in a large number of cases."

Here follows citation of cases by the United States Circuit Court for the Northern District of Florida (following the Florida Supreme Court), and by the courts of Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Washington, West Virginia and Wisconsin. As opposed to these are decisions in the courts of Alabama, Maryland, New Hampshire and possibly one or two others.

The Canadian decisions are in line with the majority of those of our American courts. Thus in the Common Pleas Division of the High Court of Justice for Ontario, in the case of *Steinhoff v. McRae*, 13 Ont. 546, it is held that the effect of the condition in the contract that the timber was to be removed within two years was to limit the right of removal to that time: that the right to the trees or timber that was so given to the vendee by the agreement "was only to have the right to cut and remove the timber within the two years from the date of the agreement." This case was decided on the authority of *Johnston v. Shortreed* (Q. B. Div.), 12 Ont. 633. There the agreement of sale and purchase of merchantable pine on certain described property contained a clause which read, "provided, however, that the said timber and logs shall be cut and removed off said lot on or before the 4th day of April, 1884." The court of Queen's Bench for Ontario held that this agreement could not be considered as an absolute grant of the pine trees suitable for the business of the grantee subject to a covenant by them to cut and remove the trees within ten days but that it was a grant of the pine subject to the condition that

the timber and logs should be cut and removed off the property on or before the day named.

A very recent case (*Bond v. Ungerecht*, 129 Tenn. 631, 167 S. W. 1116) presents the principle upon which the majority of the courts proceed so clearly, that we venture to copy what Mr. Justice WILLIAMS has there said as meeting our own views. It was an action to recover of defendant a number of logs which it was alleged were wrongfully cut on the land of the complainant. The complainant had conveyed standing timber to defendants' assignor, by deed dated November 3, 1905. The deed recited that complainant, in consideration of \$5000 cash,—

“ ‘Have sold and do hereby transfer and convey unto said Hatchie Manufacturing Company (assignor of defendants) all of the timber of every kind and description (on tract of land, described).

“ ‘To have and to hold all of said timber, unto said Hatchie Manufacturing Company, and its assigns forever. (Here are inserted covenants of seisin, incumbrance and general warranty.)

“ ‘It is expressly understood and agreed by the parties hereto, that said Hatchie Manufacturing Company, and its assigns, are to be allowed five (5) years, but not longer, from this date, to cut and remove from said land the timber hereinbefore sold and conveyed.’

“ ‘The primary contention of defendants is that by the deed the grantee took an absolute and indefeasible title to the timber, so that regardless of the time limit the trees were subject to be cut and removed at will on payment of damages done to the lands of complainant on which the timber or logs were, in any effort to remove the same.’”

Citing *Carson v. Lumber Co.*, 108 Tenn. 681, 69 S. W. 320; and *Box Co. v. Moore*, 114 Tenn. 596, 87 S. W. 415, as cases in which this point was not distinctly decided, Mr. Justice WILLIAMS continues:

“The authorities cited and reviewed in those cases need not be recanvassed in this opinion. A large number of decisions on the subject in other jurisdictions have been reported since the dates of those decisions, and, while the lack of harmony in the cases has not passed, the decided trend of the recent authorities is towards the view signified in our two cases referred to, and now by us held to be applicable to the deed in contest.

“A typical and leading case relied upon by the defendants is that of *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58, in which the deed was almost identical with the one we have under review. It was there held that the deed vested a title in the trees in the grantee, not forfeited by a failure to remove the timber within the time limited; that the provision allowing a period of years within which to cut and remove the timber conveyed is to be treated as a covenant to cut and remove on the part of the grantee, who could still enter and remove the timber at his pleasure, being liable to the grantor for such damages to the freehold as he should cause in so doing; and that the grantor would also have a right of action against the grantee for a breach of the covenant in not removing as agreed. Other recent cases in accord with that view are collected by the annotator in notes to *U. S. Coal & Oil Co. v. Harrison*, 71 W. Va. 217, 76 S. W. 346, in 47 L. R. A. (N. S.) 871, along with the cases *contra*.

“In our view, in this Alabama case and other cases cited by the defendants, the contract is construed technically and in a way to lead to results in declared rights that are inequitable and in remedies that are inadequate. The soundness of a construction that gives rise to so many and such remedies on breach of the contract may well be doubted. Some of the courts holding to the doctrine of indefeasible title declare that, although the grantee does not lose his title by failure to

remove the timber from the land within the period limited, the court cannot give him authority to enter to remove after expiration of the period. In this view there would be an existing title barren of right to be enforced legally, to be enjoyed only by way of a trespass. [*Pierce v. Finerty*, 76 N. H. 38, 76 Atl. 194, 79 Atl. 23, 29 L. R. A. (N. S.) 547.]

“The better conception of the rights of the parties appears to us to be that such a deed passes a title to the timber which is subject to defeasance as to such of the timber as is not removed within the time fixed for removal; that the title of the grantee terminates, except as to timber removed, with the termination of the grantee’s right of entry. As was well said by Mr. Justice BEARD in *Carson v. Lumber Co.*, supra, under the other rule:

“ ‘The standing timber may interfere with the use of the soil by its owner, practically oust him from its control and enjoyment, without’ a contract in terms ‘for such extensive rights. The lumber company, claiming under the original grantees, purchased timber and the right to cut and remove it, and not land, and yet upon its contention . . . it has the right to use the soil for sustenance of standing trees, and the land as a depository for the cut, and their removal, forever, if it pleases.’

“An element that may enter into consideration as inuring to the benefit of the grantor is the clearing of the land for tillage in the contracted removal of timber, and this advantage would be lost to the landowner under the doctrine we discard, if it should please the grantee to leave the timber standing beyond the time limit.

“The stipuation allowing five years, but not longer, to cut and remove the timber from the land, was not complied with by a mere cutting. A severance from the soil is not a removal from the premises, and such as has been cut beyond the point of such severance

into the form of saw logs is lost to the grantee if not removed from the land within the allowed period. [Box Company v. Moore, *supra*; Anderson v. Miami Lumber Co., 59 Or. 149, 116 Pac. 1056; Rowan v. Carleton, 100 Miss. 177, 56 South. 329; Hitch Lumber Co. v. Brown, 160 N. C. 281, 75 S. E. 714.]”

It will be noted that the deed in the Bond case, after stating that the grantees are to be allowed five years to cut and remove the timber from the land, following the words “five years,” contains the words, “but not longer.” The deed before us does not contain these words “but not longer.” We do not think the presence or absence of these words is at all material. In each case a definite period is set, and in a great majority of cases where that condition occurs, it has been held that “a reasonable time” for removal is not granted; the removal must be within the period stipulated. Hence, the insertion by the trial court of the words “within a reasonable time” was error.

Learned counsel for respondent claim that the decision of many courts, particularly those of Michigan, sustain their contention, citing and quoting from Huron Land Co. v. Davison, 131 Mich. 86. We do not think that case applicable here. The deed there considered fixed no definite time for removal of the timber and the court held that in such case a reasonable time was to be allowed as also notice given to remove. That is not this case.

In Hodges v. Buell, 134 Mich. 162, with a case before it in which the grantor “reserves all saw timber on said land, with right to enter upon and remove same within two years, also rights to build roads across and cross said land within two years from date,” that same court held that all the timber standing on the land after the expiration of the two years belonged to the grantee. A very full discussion of this question in all of its various aspects will be found in the opinion in this case. In line with it are Newberry v. Chicago Lumbering

Co., 154 Mich. 84; Dye v. East Shore Woodenware Co., 169 Mich. 78; Sullivan v. Godkin, 172 Mich. 257.

The points made by learned counsel for respondent that the deed passed an absolute title to the timber; that whether a clause in it be a covenant of condition; that the law abhors a forfeiture; that in construing a written instrument each and every part should be given effect, are met by the decision in Bond v. Ungerecht, supra, where it is distinctly held that "the better conception of the rights of the parties appears to us to be that such a deed passes a title to the timber which is subject to defeasance as to such of the timber as is not removed within the time fixed for removal; that the title of the grantee terminates, except as to timber removed, with the termination of the grantee's right of entry."

Our conclusion is that the judgment in this case should be reversed and the cause remanded for such further proceedings, as under the rule here announced, the parties may deem proper to take. It is so ordered. *Norton* and *Allen, JJ.*, concur.

LEROY ASBURY, by Trustee, Appellant, v. ED C. SHAIN et al., Administrators, Respondents.

St. Louis Court of Appeals. Argued and Submitted May 6, 1915.
Opinion Filed June 8, 1915.

1. **WILLS: Rules of Construction.** A will is to be interpreted through an examination of the whole instrument, in an attempt to arrive at the intention of the testator, and the technical import of words is not to prevail over the obvious intent of the testator; but that intent must not only clearly appear, but be capable of being carried out, and if the testator has so framed his will as to make it impossible to determine what he intended, then the court must construe it in accordance with accepted rules of interpretation and as the testator has written it—the

true inquiry being, not what the testator meant to express, but what the words used actually do express.

2. ———: **Definitions: "General Legacy:" "Specific Legacy."** A legacy is general, where its amount or value is a charge upon the general assets in the hands of the executors, and where, if these are sufficient to meet all the provisions in the will, it must be satisfied; it is specific, when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other.
3. ———: **Will Construed: General or Specific Legacy.** A will bequeathed in trust for testator's grandson notes and securities to the amount of \$5000, to remain on interest, and, as fast as collected, the proceeds to be reinvested in loans at the best rate of interest, and to continue to be invested until the grandson attained his majority. The inventory of testator's estate consisted of one hundred and ten shares of corporate stock and notes of the face value of \$12,113, of which \$6738 bore seven per cent interest and \$5375 bore six per cent interest. *Held*, that it was impossible to apply the legacy to any specific notes or securities, and hence the legacy was a general one, payable out of the general assets of the estate.
4. ———: **Interest on Legacy: Demand.** As a general rule, a general legacy does not bear interest until the time fixed by law for distribution, or, where the will is contested, until after the termination of the contest, but where interest is specifically made a part of the legacy, it is to be allowed from the death of the testator, and no demand therefor is necessary.
5. ———: ———: **Rate of Interest.** Where a will bequeathed notes and other securities to a certain amount, with interest, without specifying the particular notes and other securities that were intended to be bequeathed, and testator's estate consisted of notes and other securities aggregating more than the amount of the bequest, some of the notes bearing six per cent per annum and others bearing seven, the legal rate of interest—six per cent per annum—was recoverable.
6. **TRUSTS: Failure to Appoint Trustee: Effect.** The fact that a trustee of notes and securities constituting a general legacy was not appointed until long after the death of the testator would not prevent a recovery of interest due the trust estate, since a trust never fails by the mere failure of appointment or qualification of a trustee.

Appeal from Shelby Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

REVERSED AND REMANDED (*with directions*).

R. S. Matthews, Otho F. Matthews and H. A. Wright for appellant.

(1) The rule of construction of a will is that the whole will must be taken together and that construction given that was the intention of the testator. Sec. 583, R. S. 1909; *Grace v. Perry*, 197 Mo. 550; *Peregnet v. Berthold*, 188 Mo. 61. (2) The testator in the will in question, in the body thereof, set out and bequeathed for Leroy Asbury, five thousand dollars in money. In the codicil he revoked this provision and gave him \$5000 in notes and securities. The bequest in the will as first written was a special bequest and like gifts are so declared by the appellate courts of Missouri. Much more so is the bequest in the codicil. There could be no purpose in the mind of the testator in changing the bequest from money to notes, only that the bequest to Leroy Asbury should draw interest from the date of death, so there would be no time lost in finding good loans by the trustee. He gives notes. The interest the notes bear is just as much a part of the bequest as the notes themselves. The interest is a part of the notes. Further, the codicil provides for the payment of the interest for the benefit of the beneficiaries in certain contingencies as cases hereinafter cited, which makes the bequest draw interest from the death of the testator, even if the bequest was for so many dollars in money instead of notes. See *Gaston v. Hayden*, 98 Mo. App. 683. (3) Interest is adjudged from date of death, on a special legacy, even though the bequest is for so many dollars. See *In re Estate Catron*, 82 Mo. App. 416; *Cooke v. Meeker*, 36 N. Y. 15; *Matteo v. Stanfield*, 135 N. Y. 293.

V. L. Drain for respondents.

(1) The legacy giving "notes and securities to the amount of five thousand dollars," is a general leg-

acy, demonstrative in its nature, but not in any sense a specific legacy. 18 Am. and Eng. Ency. of Law (2 Ed.), pages 711-713; Rice Probate Law, pages 368-369; 2 Williams on Executors (6 Ed.), 1250-1251; 2 Redfield on Wills (3 Ed.), 132; Kelley's Probate Guide (4 Ed.), sec. 321; Borland Law of Wills, sec. 62. (2) General legacies do not bear interest from the death of the testator, or from the date of the probate of the will. 18 Am. and Eng. Ency. of Law (2 Ed.), 793; Borland Law of Wills, sec. 86, page 248. (3) Interest cannot be lawfully charged upon this legacy until after the contest proceeding was ended and the result thereof certified to the probate court of Shelby county. *State ex rel. v. Adams*, 71 Mo. 620; *Good Samaritan Hospital v. Trust Co.*, 137 Mo. App. 179, 117 S. W. 637; *In re Catron Estate*, 82 Mo. App. 426.

REYNOLDS, P. J.—One John R. Jones, by the third clause of his will, bequeathed to John F. Wood, in trust for testator's grandson, Leroy Asbury, "the sum of \$5000, to be loaned by said John F. Wood at the best rate of interest possible and on good security until said Leroy Asbury shall attain the age of twenty-one years, such of the interest as said John F. Wood shall deem necessary to be paid to said Leroy Asbury or used for his benefit and the interest not so paid or used to be added to the principal and loaned in the same manner as the principal and when said Leroy Asbury shall have attained the age of twenty-one years said sum of five thousand dollars with the accumulated interest to be paid to him by said John F. Wood."

By a codicil to this will the testator bequeathed to Wood, in trust for testator's grandson Asbury, "notes and securities to the amount of \$5000. Said notes and securities to remain on interest and as fast as collected the proceeds to be reinvested in loans at the best rate of interest and to continue to be so invested until the said Leroy Asbury shall have attained

the age of twenty-one years when said notes and securities and all new notes and securities for proceeds reinvested and all cash proceeds on hands of such old notes as may have been collected and not reinvested to be turned over by said John F. Wood to said Leroy Asbury.

"If the said Leroy Asbury shall have attained the age of twenty-one years before my death the notes and securities herein mentioned and hereby devised to said Leroy Asbury to go directly to said Leroy Asbury and vest in him without the intervention of a trustee. The said John F. Wood shall use any accumulated interest for the use and benefit of said Leroy Asbury and all interest not so used shall be safely invested in the same manner as herein directed with regard to the principal.

"I hereby revoke item third of my last will and testament to which this is a codicil, so that said Leroy Asbury shall take, have and hold, under my will only the property mentioned in this codicil."

The will with its codicil was admitted to probate in the probate court but was contested by Leroy Asbury, through his next friend, B. B. Asbury, and the contest determined in the circuit court about May 1, 1912. It appears that this contest was settled under some arrangement as a part of which Leroy Asbury was awarded \$5000 over and above the amount named in the will. Wood, the trustee named in the will, refused to qualify and from the time of the death of Jones until June 3, 1912, there was no person appointed or who qualified as trustee in his place, but on the latter date it appeared that B. B. Asbury was appointed and qualified. On June 12, 1912, the probate court of Shelby county, having made an order directing the payment of this \$5000 awarded Leroy Asbury in the settlement of the contest over the will, that sum was paid to his trustee and is not here involved. But the trustee also demanded that the \$5000 mentioned

in the codicil be satisfied by turning over to him interest-bearing notes in that amount and then in the hands of the administrators, or that the administrators turn over to him \$5000 and interest thereon from the date of the death of the testator. The probate court refused to make such order, but ordered payment of the \$5000 bequeathed by the codicil, without interest. This amount was thereupon tendered to the trustee and he accepted it without remitting his claim for interest. From this action of the probate court the trustee appealed to the circuit court of Shelby county.

In the circuit court, a jury being waived, the cause was tried by the court, which, in its judgment filed, held that the legacy was a general legacy, and that the claim for interest upon the legacy, the legacy not having been payable or paid until after the conclusion of the contest over the will, did not draw interest from the date of the death of the testator; that neither the legatee nor his trustee was entitled to any interest thereon pending the contest over the will. The court accordingly found in favor of defendants and against plaintiff and ordered and adjudged "that the defendants go hence and that the costs herein be taxed against plaintiff." From this plaintiff duly perfected his appeal to our court.

The sole questions presented to us are whether this legacy is a general or special legacy, or, as sometimes called, a specific legacy, and whether it draws interest.

It is true that a will is to be interpreted by an examination of the whole will in an attempt to arrive at the intention of the testator, and that the technical import of words is not to prevail over the obvious intent of the testator. But that intention must not only clearly appear but be capable of being carried out. If the testator has so framed his will as to make it impossible to determine what he intended, then the court in construing it must do so in accordance with accepted

rules of interpretation and as the testator has written it; the true inquiry is not what the testator meant to express, but what the words used express. If it was the intention of this testator to have made a specific legacy of specific notes, he was unfortunate in the way in which he carried out that intention. By unmistakable language here used he has made a general legacy in favor of his grandson and not a specific one of specific notes.

Mr. Black, in his Law Dictionary (2 Ed.), has defined general and special or specific legacies very aptly. He defines a general legacy to be "a pecuniary legacy, payable out of the general assets of a testator. . . . One so given as not to amount to a bequest of a particular thing or particular money of the testator, distinguished from others of the same kind; one of quantity, not specific."

He defines a special or specific legacy to be, "A legacy or gift by will of a particular specified thing, as of a horse, a piece of furniture, a term of years, and the like. [Morris v. Garland, 78 Va. 222.] In the strict sense, a legacy of a particular chattel, which is specified and distinguished from all other chattels of the testator of the same kind; as of a horse of a certain color. A legacy of a quantity of chattels described collectively; as a gift of all the testator's pictures. [Ward, Leg. 16-18.] A legacy is general, where its amount or value is a charge upon the general assets in the hands of the executors, and where, if these are sufficient to meet all the provisions in the will, it must be satisfied; it is specific, when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other; as the bequest of a horse, a picture, or jewel, or a debt due from a person named, and, in special cases, even of a sum of money."

See, also, 2 Bouvier's Law Dict. (Rawle's Ed.), where a general legacy is defined as "so given as not to amount to a bequest of a particular thing or money, of a particular fund, distinguished from all others of the same kind;" while a specific legacy is defined to be "a bequest of a specified part of the testator's personal estate, distinguished from all others of the same kind. . . . A specific legacy may be of animals or inanimate things, provided they are specified and separated from all other things, as money in a bag, or money marked and so described; as, I give two eagles to A. B, on which are engraved the initials of my name. . . . If the specific article given be not found among the assets of the testator, the legatee loses his legacy."

Here we have a legacy of "notes and securities to the amount of \$5000." The inventory of the estate of the decedent was in evidence and is before us. Exclusive of cash, the total amount of personal property, consisting of one hundred and ten shares of stock in a corporation, and of twenty-six notes, running from \$11.63 to \$2636.25, amounting in all to \$23,114.23. That left notes of the face value of \$12,114.23; of these \$6738.43 bore seven per cent interest and \$5375.80 bore six per cent interest. It is true that by the codicil it is provided that the notes and securities are to remain on interest. But to which of these several notes can it be said with any certainty that the bequest of \$5000 in notes and securities can be applied? Does it apply to those drawing six per cent or those drawing seven per cent? Possibly a combination of notes could be made so as to bring out the exact sum of \$5000, but any such selection of any particular notes would be arbitrary. Is this legacy to be taken from the stock in the bank? The will affords us no guide for determining what particular notes or securities the testator intended to give. Therefore, considering the terms of the will in connection with the estate which the testator

left, it is impossible to apply this legacy to any specific notes or securities.

That, as a general rule, a general legacy does not bear interest until the time fixed by law for distribution, or, in case the will is contested, until after the termination of that contest, has been determined by our Supreme Court, by the Kansas City Court of Appeals, and by our court in three cases which we think settle the question here. [See *State ex rel. Nichols v. Adams*, 71 Mo. 620; *In re Estate Catron*, 82 Mo. App. 416; and *Good Samaritan Hospital v. Mississippi Valley Trust Co.*, 137 Mo. App. 179, 117 S. W. 637.] But as pointed out in those cases, especially in the *Catron* case, *supra*, where, as here, interest is specifically made a part of the legacy, it is to be allowed from the date of the death of the testator. It was clearly in contemplation of the testator that his grandson should receive interest on the fund, and that interest is not lost either by the fact that here is a general and not a specific legacy, or that the will was in contest. That the bequest was to draw interest from the death of the testator is clear, for interest was a part of the bequest. [In *re Estate Catron*, *supra*.]

Some of these notes draw six per cent and others seven per cent, and as we cannot affix this legacy to any one of them, the rate of interest can only be the legal rate, namely, six per cent per annum from the date of the death of the testator.

The fact that a trustee was not appointed until long after the death of the testator is immaterial. A trust never fails by the mere failure of appointment or qualification of a trustee. The will gave the right to interest. No demand was necessary. [*Good Samaritan Hospital v. Mississippi Valley Trust Co.*, *supra*, l. c. 187.]

The judgment of the circuit court is reversed and the cause remanded with directions to that court to enter up judgment in favor of the trustee for interest

on the \$5000 at six per cent from the date of the death of the testator and that the judgment so entered be certified by the circuit court to the probate court of Shelby county. *Nortoni* and *Allen, JJ.*, concur.

J. A. BOTTS et al., Respondents, v. ST. LOUIS & HANNIBAL RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, June 8, 1915.

1. **COMMON CARRIERS: Carriage of Live Stock: Liability.** While, in order to establish liability against a carrier for injury to a shipment of live stock, it is not necessary to prove negligence on the part of the carrier by direct evidence, it is essential to show a state of facts or circumstances from which negligent conduct on its part may be inferred.
2. ———: ———: ———. A carrier is relieved of liability for failure to deliver live stock in good condition only by the act of God or the public enemy, the fault of the shipper, or the inherent vice of the stock.
3. ———: ———: ———. Where the negligence of a carrier contributes to cause injury to a shipment of live stock, the carrier is liable therefor, although the condition of the weather or the act of God is a contributory cause.
4. ———: ———: ———: **Sufficiency of Evidence.** In an action against a carrier for damages for the death of hogs shipped on a warm day, evidence that the hogs were sound and healthy when delivered to the carrier, that the car in which they were loaded was allowed to stand in its yards for some time, that twelve hogs, out of a shipment of eighty-three, were dead within four hours after they were loaded, and one died the next morning, together with opinion evidence, to the effect that the proportion of loss was unparalleled in that locality, and that, if the car had been kept moving, the hogs would not have died, was sufficient to warrant a finding that the carrier was negligent, notwithstanding it wet the car and furnished the hogs with water while the car was standing.
5. ———: **Limitations on Liability: Consideration.** A provision in a bill of lading, requiring the shipper to give the carrier notice of any claim on account of loss of or injury to the ship-

Botts v. St. Louis & Hannibal Railroad.

ment, as a condition precedent to a right of recovery, is invalid, unless supported by a separate consideration independent of the regular transportation charge.

6. ———: ———: ———. A recital in a shipping contract, that the shipment is made under the lesser of two rates which are held out to the public, will, in the absence of evidence to the contrary, and where it does not appear that the regular tariff rate was exacted, be regarded as sufficient, *prima facie*, to show an independent consideration for a limitation upon the carrier's liability.
7. ———: ———: ———: "Tariff Rate." A bill of lading, which required the shipper to give special notice of claims, recited, whereas the carrier transports live stock at less than its tariff rates when its liability is limited by contract, that it was agreed that the carrier would transport one carload of stock as per tariff and rules in effect on date of shipment, at the through rate of tariff per car, the same being a special rate less than the regular tariff rate applying on shipments not covered by the special conditions. The bill of lading mentioned no other tariff. *Held*, that the expression "tariff rate" meant the usual rate, and hence the bill of lading showed no reduction affording a consideration to give validity to the special condition requiring notice.
8. ———: Injury to Live Stock: Excessiveness of Recovery. In an action against a carrier for the death of hogs shipped, *held*, under the evidence, that the jury did not award a recovery for hogs dying after the shipment had passed beyond defendant's line.

Appeal from Audrain Circuit Court.—*Hon. James D. Barrett*, Judge.

AFFIRMED.

Fry & Rodgers and *J. D. Hostetter* for appellant.

(1) It is well settled that where a shipper sues two or more carriers under the provisions of Sec. 5446, B. S. 1909, he can only recover from the carrier through whose negligence the loss or damage occurred. *Crockett v. Railroad*, 147 Mo. App. 347; *Wilburn v. Railroad*, 148 Mo. App. 692. It will be noted in this case that the shipping contract read in evidence provided expressly

that the defendant, the St. Louis & Hannibal Railroad Company only contracted and agreed to carry the shipment to the end of its line, to-wit, Gilmore, Missouri, and there to deliver the same to the Wabash Railroad Company. This it had a perfect right to do. *Western Sash & Door Co. v. Railroad*, 177 Mo. 641; *Jones v. Railroad*, 115 Mo. App. 232; *McLendon v. Railroad*, 199 Mo. App. 128; *Bank v. Railroad*, 72 Mo. App. 82; *McCann v. Eddy*, 133 Mo. 59. (2) The court erred in refusing to give effect to the seven days' notice clause in the shipping contract. This provision has been upheld by our courts. *Bellows v. Railroad*, 94 S. W. 577.

Fauntleroy, Cullen & Hay for respondents.

This is a shipment wholly within the State. The contract does not specify any rate, but recites that the stock was shipped at tariff rates, and, under the rule applied to shipments wholly within this State, there is no consideration to support the agreement to give notice and such a clause is void. *Libby v. Railroad*, 137 Mo. App. 287; *Burgher v. Railroad*, 139 Mo. App. 70; *Johnson Grain Co. v. Railroad*, 177 Mo. App. 198; *Holland v. Railroad*, 139 Mo. App. 720; *Creel v. Railroad*, 137 Mo. App. 31; *Ficklin v. Railroad*, 117 Mo. App. 225; *Leas v. Railroad*, 157 Mo. App. 461.

NORTONI, J.—This is a suit for damages accrued on account of the loss of several hogs in transit through the alleged negligence of defendant, a common carrier. Plaintiffs recovered and defendant prosecutes the appeal. Since the appeal was perfected plaintiff Trimble departed this life, and the case as to his interests now stand revived in the name of his executrix.

It appears that on March 21, 1907, plaintiffs Botts and Trimble as copartners, consigned at Perry, Mis-

souri, the shipment of eighty-three fat hogs over defendant's line to Gilmore, Missouri, there to be delivered to the Wabash Railroad Company, a connecting carrier, for transportation to East St. Louis, Illinois. The shipment was delayed some in transit over defendant's line, but this is unimportant. Thirteen of the hogs were found to be dead on the following morning and the suit proceeds on the grounds of negligence for such loss. Both defendant St. Louis & Hannibal Railway Company and the Wabash Railroad Company were sued in the first instance as connecting carriers, but at the trial the court directed a verdict for the Wabash Railroad and submitted the case to the jury against the present defendant alone. In so far as this defendant is concerned, the transaction involves an intrastate shipment only, from Perry to Gilmore, Missouri, where delivery was made to the Wabash.

The evidence is, the hogs were loaded in a car on defendant's line at Perry, Missouri, about one o'clock in the afternoon, and were transported by it from thence to Oakwood, near Hannibal, on its line, where the car was set out to await the regular stock train later in the evening. About five o'clock defendant's regular stock train number 7 picked up the carload of hogs at Oakwood and twelve of them were found to be dead at that time. The weather was warm, though in the month of March, for it appears the thermometer ranged on that day between sixty-nine and ninety-three degrees, and it appears the car was wet, the hogs having been furnished water by defendant during the while.

It is argued there is no evidence of negligence on the part of defendant. It is true there is no pointed and direct evidence of particular acts of such, but the situation presented is extraordinary, in that it is unusual for so many hogs to die out of the total number of eighty-three in the car. There is evidence by stock men to the effect that if the car had been kept mov-

ing rather than standing so long at Oakwood in the heat, such fatalities would not have occurred.

Negligence may be inferred from circumstances attending the case and direct evidence to that effect is not essential. It appears the hogs were all healthy and in good condition when loaded at Perry at one o'clock in the afternoon, and in view of this the evidence appears to be sufficient to make a *prima-facie* showing of negligence on the part of defendant, for that, in the ordinary course of events, so large a number of hogs in good condition would not die in transit during so short a time, if due care were exercised on the part of the carrier.

In the case of inanimate freight, the common carrier is an insurer and the duty devolves upon him to deliver the goods intact at the point of destination; but there is an exception to this rule with respect to the shipment of live stock, which arises because of the inherent vice or propensities of the animals. Because of this exception, it is essential to show a state of facts or circumstances from which negligent conduct may be inferred on the part of the carrier, in order to affix liability against it. But, as before said, it is not essential to show positive acts of negligence and the circumstances attending the shipment may be such as to afford a fair inference of dereliction of duty on the carrier's part. In this view, it has heretofore been said by this court, in the case of a shipment of poultry, that, where it appeared the poultry was delivered to the carrier in good condition and after a comparatively short run delivered to the consignee with a large percentage of the poultry dead and that such death rate in shipments of like character was so extraordinary that its parallel could not be shown, the shipper made out a *prima-facie* case of negligent conduct on the part of the carrier so as to cast the burden of proof upon it. [See *Hance v. Pacific Express Co.*, 48 Mo. App. 179.]

So, too, the Kansas City Court of Appeals declared in the case of a shipment of twenty-four horses, which were delivered to the carrier in good condition at Kansas City, and nineteen of them were found to be bruised on the following morning, upon arrival at St. Louis, two of which subsequently died, such facts alone would suffice as a *prima-facie* showing of negligence against the carrier so as to place the *onus* upon it of exculpating itself from fault. It was said that the jury might infer from these facts that the horses were injured as a result of negligent conduct on the part of the carrier and not from their own vicious propensities. [See *Cash v. Wabash R. R. Co.*, 81 Mo. App. 109. See, also, *Libby v. St. Louis, I. M. & S. R. Co.*, 137 Mo. App. 276, 117 S. W. 659.]

The evidence, as before stated, is that all of the hogs were in a healthy, sound condition when delivered into defendant's care at Perry, Missouri, about one o'clock in the afternoon, and that, at five o'clock on the same afternoon, twelve of them were found to be dead in the car standing on the track at Oakwood, thirty miles distant. Experienced stock men testified without objection that such was an unparalleled death rate in the shipment of like hogs in that locality and in this respect the condition revealed was extraordinary. While there is evidence that the hogs had been watered during the time and permitted to stand in a wet car during the heat of the afternoon, which was excessive for the time of year, yet, in view of all the facts and circumstances, it may not be said as a matter of law that there is nothing in the case from which the jury might infer negligent conduct on the part of defendant. No explanation is offered in defendant's evidence to exculpate it, save that it attributes the loss to the extreme heat which then prevailed; but obviously it should have exercised care with respect to that circumstance, which it appears was well known to all concerned, for, according to the evidence on the

part of plaintiffs, if the stock had not been permitted to stand a considerable while in the heat, the hogs would probably not have died. In the shipment of live stock and for failure to deliver in good condition, the carrier is relieved of liability only by the act of God, the public enemy, the fault of the shipper, or the inherent vice of the animal. It does not conclusively appear that the hogs came to their death solely from any one of these causes, and no one can doubt that if the loss occurred through the negligent conduct of the defendant contributing thereto, it will nevertheless be required to compensate it, though it appears the condition of the weather or the act of God contributed in part thereto as well. [See Gratiot Street Warehouse Co. v. Missouri, K. & T. R. Co., 124 Mo. App. 545, 102 S. W. 11.]

In its answer defendant pleads a special contract with plaintiff pertaining to the shipment, to the effect that it undertook to transport the hogs only to the terminus of its own line at Gilmore, Missouri, and also that this contract contains a provision to the effect that, in case of loss of or injury to any of the stock during the transit, notice shall be given to defendant's freight agent of any claim to be made on account thereof, within seven days thereafter. It does not appear that such notice was given and defendant invokes this provision of the contract in bar of a recovery; but obviously the matter is unavailing here, for there is no evidence whatever tending to prove that the contract of shipment was entered into for other than the usual tariff rates for such shipment—that is to say, there appears no separate or independent consideration for this provision in the contract. It was formerly the rule of decision in this State, as we understand the authorities, that such requirements in the shipping contract—that is, that the shipper should give notice within a specified time, which was reasonable in itself, of his purpose to lay claim to damages on account of the fault

of the carrier—was a reasonable regulation and valid, though no independent or separate consideration appeared therefor. [See *Rice v. Railroad*, 63 Mo. 314; *Dawson v. Railroad*, 76 Mo. 514.] But a more recent decision of the Supreme Court proceeds in a contrary view. In the case of *George v. Chicago, R. I. & P. R. Co.*, 214 Mo. 551, 113 S. W. 1099, the Supreme Court treated such a stipulation, requiring notice of the claim to be given as a condition precedent to the right of recovery on the part of the shipper, as a limitation upon the common-law liability of the carrier and, therefore, wholly invalid unless supported by a separate consideration independent of the regular charge for the transportation of the freight. In other words, it was there declared that some concession, such as a reduced rate of freight or other consideration, must appear, in order to render it valid. We have had occasion to examine this question heretofore, and, in view of the Supreme Court decision last cited, declared the rule to be as stated—that is, that the stipulation requiring such notice is invalid as a limitation on the carrier's liability, unless a separate consideration appears therefor. [See *Libby v. St. Louis, I. M. & S. R. Co.*, 137 Mo. App. 276, 117 S. W. 659; *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673.]

But it is argued that, though there is no direct evidence of a reduced rate or other independent consideration, such sufficiently appears by the recital in the contract itself, in view of the fact that there is no evidence to the contrary. It is well settled that a recital contained in the shipping contract, to the effect that the shipment is made under the lesser of two rates which are held out to the public, will, in the absence of evidence to the contrary, be regarded as a sufficient prima-facie showing concerning the matter of a reduced rate or independent consideration for limitations upon the carrier's liability. [See *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 343, 4 S. W. 689.] But this

rule obtains only in those cases where it does not appear that the regular tariff rate was exacted.

The recitals of the contract invoked here are as follows:

"Whereas, the St. Louis & Hannibal Railway Company as a common carrier, transports live stock at less than its tariff rates when its liability is limited by contract as follows: It is mutually covenanted and agreed by and between the parties hereto: That said party of the first part will transport for the said party of the second part one carload of stock . . . as per tariff and rules in effect on the date of shipment at the through rate of trf. per car, from Perry, Missouri, Station, the same being a special rate less than the regular tariff rate applying on shipments not covered by the conditions and stipulations herein contained . . . to Gilmore, Missouri, Station."

It appears from this that no rate of freight whatever is mentioned in the contract except the tariff rate. It is stated the shipment is to be made at the "through rate of trf. per car from Perry, Missouri, Station, the same being a special rate less than the regular tariff rate." It has been pointedly determined by the Supreme Court in the case of *Kellerman v. Kansas City, St. J. & C. B. R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828, that the employment of the words "tariff rate" in the shipping contract signifies the regular lawful rate for such shipment, and nothing more nor less, and the same was declared, too, by the same court in *George v. Chicago, etc., R. Co.*, 214 Mo. 551, 113 S. W. 1099, where the contract recited substantially the same as that above set forth.

In speaking of the words "tariff rate" employed in the shipping contract in the case last cited the court said:

"Therefore when the contract shows that that was the rate charged it was vain to recite therein that it

was 'less than the rate charged for shipments transported at carrier's risk.' "

This court, too, has heretofore declared, on the identical language employed in this shipping contract, that the language reciting the shipment was made for the tariff rate and that such rate was less than the regular tariff rate for shipments was insufficient to show *prima facie* a consideration of a reduced rate of freight for the shipment, because nothing appeared therein concerning the rate as to what it was and the recitation as to tariff rate suggests only the regular lawful rate. [See *Farmer's Bank v. St. Louis & H. R. Co.*, 119 Mo. App. 1, 95 S. W. 286; *Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co.*, 113 Mo. App. 144, 87 S. W. 553; see, also, to the same effect *Burns v. Chicago, etc., R. Co.*, 151 Mo. App. 573, 132 S. W. 1.]

It appears, therefore, that the requirement of the special contract concerning notice is unavailing, for that no separate consideration appears to support it.

But it is argued the evidence shows that only twelve of the hogs died while in defendant's possession, and that, though thirteen of them were dead on reaching East St. Louis, only twelve were shown to have been dead before delivery to the connecting carrier, the Wabash Railroad Company at Gilmore, Missouri, which latter company was discharged from the case by peremptory instruction. It is true that the evidence shows only twelve of the hogs died while in defendant's possession, but nevertheless the judgment given is authorized by the evidence. It was admitted on the trial that none of the hogs which died weighed less than two hundred pounds. The evidence is conclusive, and not denied, that the hogs were of the market value of \$6.32½ per hundredweight. This being true, by treating each one of the hogs that died as weighing two hundred pounds only they were of the value of \$12.65 per head. The value of twelve hogs at

\$12.65 constitutes the total amount of \$151.80. This is the precise amount of the verdict given by the jury and it is clear the evidence supports the finding. It would seem the jury awarded a verdict for the loss of the twelve hogs only.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

C. F. MOORE, Respondent, v. J. F. McHANEY, Appellant.

St. Louis Court of Appeals, July 2, 1915.

1. **JUSTICES' COURTS: Pleading: Requisites of Statement.** A statement of a cause of action filed in a justice's court, which advises defendant of the nature of the claim and is specific enough to bar another action on the same demand, is sufficient.
2. **STATUTE OF FRAUDS: Promise to Pay Debt of Another: Substitution of Debtors.** Where one agrees with the creditor of a third person to pay the debt, and the original debtor is fully released and discharged thereon, the contract is not within the Statute of Frauds (Sec. 2783, R. S. 1909), which provides that no action shall be brought on a promise to answer for the debt of another, unless the agreement or some memorandum thereof is in writing, etc., and hence the contract is valid, although not in writing, for, in such case, the original debt is gone, and a new one is created, with the promisor as a substituted debtor.
3. **———: ———: Payment of Promisor's Own Debt.** Where one undertakes to pay the debt of another, and by the same act also pays his own debt, which is the motive for the promise, the undertaking is not within the Statute of Frauds (Sec. 2783, R. S. 1909) and hence need not be in writing.
4. **———: ———: Promise not Made to Creditor.** An oral agreement to pay the debt of another is not within the Statute of Frauds (Sec. 2783, R. S. 1909), where the promise is made to the debtor or some person other than the creditor; such an agreement, if founded upon a valid consideration, being an independent undertaking.

5. ———: ———: **Independent Consideration Beneficial to Promisor.** An oral agreement to pay the debt of another which is essentially an original undertaking on the part of the promisor to pay a debt which he makes his own, as distinguished from a collateral promise to answer for the debt of another, is not invalidated by the Statute of Frauds (Sec. 2783, R. S. 1909); and a direct and unqualified oral promise to pay the debt of another is to be regarded as original in character and unaffected by the statute, notwithstanding the primary debt still subsists, where the promise is founded upon a new and independent consideration moving to the promisor and beneficial to him and which is the motive therefor.
6. ———: ———: ———. An oral promise to pay the debt of one who was working for the promisor, which debt was secured by a chattel mortgage on mules used in the work, if the creditor would refrain from taking the mules, was not within the Statute of Frauds (Sec. 2783, R. S. 1909), since the object of the promisor was to promote his own interest by having his employee retain the mules which were being used in his service, and this furnished a new and independent consideration moving to the promisor and beneficial to him.
7. **CONTRACTS: Consideration.** Where there is no present consideration for a contract, it is a mere *nudum pactum* and unenforceable.
8. **STATUTE OF FRAUDS: Effect of Performance of Contract.** Complete performance of a contract by one contracting party forecloses his adversary from interposing the Statute of Frauds as a defense.
9. ———: **Promise to Pay Debt of Another: Instructions: Submitting Unnecessary Facts: Appellate Practice: Harmless Error.** In an action on an oral promise to pay the debt of another, an instruction given for plaintiff, which, in addition to requiring the jury to find that the promise was made in consideration of some benefit accruing directly to defendant, also required a finding that plaintiff released the original debtor, is not to be condemned as reversible error on the ground that there was no evidence tending to show that plaintiff released the principal debtor, since it merely required the jury to find more than was essential to plaintiff's recovery.
10. **APPELLATE PRACTICE: Invited Error: Instructions.** A party will not be heard to complain, on appeal, of an instruction given for his adversary, where an instruction given at his request proceeds along precisely the same lines.
11. **VERDICTS: Trial Practice: Computation of Interest by Court.** An instruction that, if the jury found for plaintiff, their verdict should be for a certain sum, which was the amount of the prin-

cipal of the promissory note sued on and interest computed thereon, was not erroneous, on the theory that the court had no right to instruct the jury as to the amount of the recovery.

12. **PLEADING: Prayer of Petition: Interest.** Where the prayer of a petition was for the balance of the principal due on a promissory note, plaintiff was not entitled to recover interest thereon, since plaintiff cannot recover more than the amount for which he sues.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker*, Judge.

REVERSED AND REMANDED.

John T. McKay for appellant.

(1) The verdict of the jury in this case is against the evidence, the weight of the evidence and is for the wrong party, and the cause ought to be reversed. There was no evidence to go to the jury. *State ex rel., Savings Trust Co. v. Hallen*, 165 Mo. App. 422; *Dutcher v. Railroad*, 241 Mo. 137. (2) The court erred in overruling defendant's demurrer to plaintiff's petition, filed in the justice's court, and permitting plaintiff to amend his petition, so as to set up a cause of action if any, which appellant denies, when no cause of action had been previously stated in the lower court. The circuit court, on appeal from the justice's court, has no greater jurisdiction than the justice had, and in this cause the petition filed in the justice's court failed to state facts sufficient to constitute any cause of action against appellant and the circuit court had no jurisdiction whatever. *Planing Mill Co. v. Short*, 58 Mo. App. 320; *Barhydt & Co. v. Alexander & Co.*, 59 Mo. App. 188; *McCann v. Sawyer*, 59 Mo. App. 480; *Reinhardt v. Kempf*, 72 Mo. App. 646; *Kellogg v. Linger*, 60 Mo. App. 578. (3) The court erred in refusing appellant's instruction number five, which was in the nature of a demurrer and given at the close of all the testimony. The testimony in this cause clearly showed that this

was a collateral undertaking to pay the debt of another and was not in writing and was, therefore, void under the Statute of Frauds. If there was any agreement on the part of appellant concerning the note in controversy it was collateral to that of the principal contractor, Hodge, and would have had to have been in writing to be binding on appellant and if it had been in writing it would have had to have a new consideration, as it was made, if at all, after the original contract had been fully executed, and as the evidence fails to disclose any, it is void, under the Statute of Frauds. *Bessig v. Britton*, 59 Mo. 204; *Hurt v. Ford*, 142 Mo. 283; *Gansey v. Orr*, 173 Mo. 546; *Moore v. Railroad* 31 Mo. App. 145; *Musick v. Musick*, 7 Mo. 495; *Peck v. Harris*, 57 Mo. App. 470; *Williams v. Williams*, 67 Mo. 661; *Glenn v. Lehn*, 54 Mo. 45; *Pfeiffer v. Kingsland*, 25 Mo. 66.

(4) The court erred in giving instruction number 1 on behalf of respondent, because said instruction directed the jury to return a verdict for a specific amount. This being a suit upon a note, the court was infringing upon the province of the jury when it instructed the jury what amount to return their verdict for. *Corbitt v. Mooney*, 84 Mo. App. 645; *Cates Adm's. v. Nickell*, 42 Mo. 169; *Burghardt v. Brown*, 60 Mo. 24; *Dyer v. Combs*, 65 Mo. App. 151; *Poulson v. Collier*, 18 Mo. App. 583; *Glenn v. Lehn*, 54 Mo. 45. (5) The verdict of the jury is not responsive to the issues made in this cause, by the pleadings and the evidence. The court told the jury in instruction number 1, given on behalf of respondent, that if they found that Hodge was indebted to respondent and that the debt was evidenced by a note and that appellant promised to pay said debt and in consideration of said promise, respondent released Hodge and accepted the defendant, and the defendant fully consented thereto, then the verdict should be for the plaintiff. No one testified that respondent accepted appellant as his debtor and released

J. B. Hodge and that appellant consented to such state of facts, and for that reason the instruction number 1 is not based upon the evidence and the verdict as rendered is not responsive to the issues made by the pleadings and the evidence. *Plymouth Cordage Co. v. Yeargain* 87 Mo. App. 561; *Fenwick v. Logan*, 1 Mo. 401; *Easton v. Collier*, 1 Mo. 421; *Hickman v. Byrd*, 1 Mo. 495; *Parker's Adm'r v. Moore*, 29 Mo. 218; *Henderson v. Davis*, 74 Mo. App. 1. *Glenn v. Lehnen*, 54 Mo. 52.

No brief filed for respondent.

ALLEN, J.—This is an action begun before a justice of the peace to recover from defendant the amount remaining unpaid on a certain note executed by one Hodge to plaintiff. It is averred that defendant, for a valuable consideration, “and for the purpose of extending the time of payment of said note,” contracted to pay the unpaid balance due upon the note, and paid fifty dollars on account thereof, leaving a balance of \$129.30 due and unpaid thereupon; and judgment is prayed for said sum with costs. Plaintiff prevailed before the justice of the peace, and upon defendant’s appeal to the circuit court and a trial there *de novo*, before the court and a jury, there was a verdict and judgment for plaintiff, and the case is here on defendant’s appeal.

One J. B. Hodge was indebted to plaintiff upon a promissory note theretofore executed by him and secured by a chattel mortgage upon a team of mules which he had purchased from plaintiff. Hodge went to work for the defendant, McHaney, apparently early in 1911, using this team of mules in clearing land, building fences and doing other work upon defendant’s property. The note to plaintiff was then overdue, and Hodge testified that when defendant asked him to come upon defendant’s place to do this work he told defendant that he would do so if defendant would “go on”

this note; that defendant did not agree to do so and later, about April, 1911, the witness told defendant that plaintiff was demanding the mules, and that he (Hodge) had written plaintiff to come and get them; that nothing further was said until a little later when defendant told the witness that he had seen plaintiff and had paid the latter \$50 on the note and "guaranteed the balance." The \$50 thus paid by defendant was money which defendant then owed Hodge.

There is no dispute as to the fact that defendant met plaintiff in "Shelton's store"—evidently in April, 1911—paid plaintiff the \$50 on the note, and made some further agreement regarding the payment of the balance then remaining due thereon. There is some conflict in the testimony as to just what was the oral agreement respecting the payment of the balance on the note. Plaintiff testified:

"We agreed in Shelton's store that if I would take \$50 and leave the team alone that he would pay it (the note) and I taken him for it." Q. "He agreed to pay \$50 on the note?" A. "Yes, sir." Q. "And did at that time?" A. "Yes, sir." Q. "And agreed to pay the rest?" A. "Yes, sir." Q. "Did you look to Hodge after that for the money?" A. "No, sir, I never did ask Hodge for a nickel." . . . Q. "And that was the contract between you and McHaney that Hodge was to keep the mules and that he (McHaney) was to pay for them?" A. "Yes, sir, that was the understanding, that he was to pay me this \$50 and me not bother the mules."

On cross-examination plaintiff said that defendant agreed "that he would pay the note or deliver the mules—to pay the money or return the mules." He denied, however, that defendant had only promised to see that Hodge paid the debt, saying: "He promised to pay me."

Two witnesses present at the time of the oral agreement in question both testified that McHaney

agreed to pay the \$50 and to pay the balance on the note some time "in the fall," and that in consideration thereof plaintiff agreed not to take possession of the mules "until fall."

Defendant's testimony is that plaintiff, at the time in question, asked him to sign the note and that he refused to do so; that he paid plaintiff the \$50, and said: "I will guarantee that you will not be put to any trouble—if old man Hodge doesn't make a good crop I will guarantee that you will have your money or get your mules."

It appears that some time in the latter part of this same year one of the mules died. Thereafter Hodge took the other mule to plaintiff who told him to take it to defendant who had agreed to be responsible for the debt. Hodge did this, but defendant denied any responsibility in the matter and directed Hodge to deliver the mule to plaintiff. Thereupon the mule was turned over to plaintiff at an agreed valuation which was credited upon the note.

The jury, upon instructions to be hereafter noticed, returned a verdict for plaintiff in the sum of \$140.32, being the amount remaining unpaid on the note, with accrued interest thereupon; and judgment was accordingly entered for this amount.

I. After the cause reached the circuit court, plaintiff was permitted to file an amended petition. It is argued that the original statement filed before the justice of the peace stated no cause of action, and that it could not be amended in the circuit court. But it is quite clear that the original statement was sufficient as a statement of a cause of action before a justice of the peace, for it sufficiently advised the defendant of the nature of the claim asserted against him, and was so far specific and definite as to bar another action upon the same demand. [See *Rundelman v. Boiler Works Co.*, 178 Mo. App. 1. c. 647, 161 S. W. 609.] It is there-

fore unnecessary to further discuss this assignment of error.

II. It is urged that the demurrer to the evidence interposed by defendant should have been sustained. Appellant contends that under the evidence adduced the oral agreement upon which defendant is here sought to be held liable is a collateral undertaking to pay the debt of another and within the Statute of Frauds. This question was raised below and is pressed upon us here.

Our statute (Section 2783, Revised Statutes 1909), which follows substantially the English Statute of Frauds and Perjuries, provides that no action shall be brought . . . to charge any person upon any special promise to answer for the debt, default or miscarriage of another . . . unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person by him thereto lawfully authorized."

From the time of the early decisions under the English statute there has been quite a contrariety of opinion as to what oral contracts fall within the statute. It is well settled that it is not every oral agreement which may in terms provide for or involve the payment of a debt of another that comes under the ban of the statute and is thereby rendered invalid.

Where the promisor, who is sought to be held liable upon an oral agreement, agrees with the creditor to assume and pay the debt of a third person, and the original debtor is fully released and discharged therefrom, the contract is not one within the statute, and is valid though not in writing. In such case the original debt is gone and a new one is created with the promisor as a substituted debtor. [See *Beall v. Board of Trade*, 164 Mo. App. 186, 148 S. W. 396; *Martin v. Harrington*, 147 Mo. App. 1. c. 711, 712, 161 S. W.

275, and authorities cited.] But it does not here appear that Hodge, the original debtor, was released and discharged. It is true that plaintiff testified that after the making by defendant of the oral promise in question he no longer looked to Hodge and made no further demands upon him. And plaintiff says of defendant: "I taken him for it." However, it nowhere appears that any steps were taken whereby to release Hodge. His liability on the note continued to exist, though plaintiff did not see fit to attempt to enforce it.

It is also true that where one undertakes to pay the debt of another and by the same act also pays his own debt, which is the motive for the promise, the undertaking is not one within the Statute of Frauds and need not be in writing. [See *Dobyns v. Rice*, 22 Mo. App. 448; *Besshears v. Rowe*, 46 Mo. 501; *Browne*, Statute of Frauds (5 Ed.), sec. 188.] But in the case before us it does not appear that the undertaking was to pay a debt of defendant, aside from the fifty dollars actually paid, except in so far as defendant may be said to have made the debt his own by the agreement in question.

Neither is an oral agreement within the statute where the promise is not made to the creditor but to the debtor or some other person. In such case the agreement, if founded upon a valid consideration, is an independent undertaking not affected by the statute. [See *Brown v. Brown*, 47 Mo. 130; *Green v. Estes*, 82 Mo. 337; *Hedden v. Schneblin*, 126 Mo. App. 1. c. 485, 104 S. W. 887; *Boone County Lumber Co. v. Niedermeyer*, 187 Mo. App. 180, 173 S. W. 57. See, also, *Van Meter v. Poole*, 130 Mo. App. 433, 110 S. W. 5; *Citizens Bank of Senath v. Douglas*, 178 Mo. App. 664, 161 S. W. 601; *Nelson v. Brown*, 140 Mo. 1. c. 588, 41 S. W. 960.] The contract here relied upon, however, was one made with plaintiff, the creditor. No express promise to Hodge on the part of defendant appears, though Hodge had sought to have defendant sign the

note and later knew that defendant had paid plaintiff the fifty dollars and had made an agreement with plaintiff respecting the payment of the balance of the note, by virtue of which agreement the mules were to remain in Hodge's possession.

The statute renders invalid only an oral promise to answer for the debt, default or miscarriage of *another*. Where the agreement is essentially an original undertaking on the part of the promisor to pay a debt which he makes his own, as distinguished from a collateral promise to answer for the debt of another, the contract is not invalidated by the statute. [See Stokes v. Mills, 171 Mo. App. 638, 154 S. W. 455; Haynes v. Johnson, 141 Mo. App. 506, 126 S. W. 177; Steele v. Ancient Order of Pyramids, 125 Mo. App. 680, 103 S. W. 108.] And though there is some conflict and confusion in the cases treating of the precise question, there is ample authority in support of the doctrine that a direct and unqualified promise to pay the debt of another, though the primary debt still subsists, is to be regarded as original in character and unaffected by the statute when the promise is founded upon a new and independent consideration moving to the promisor and beneficial to him, and which is the motive therefor. It is so held in *Martin v. Harrington*, *supra*, where in an opinion by ELLISON, J., the matter is discussed somewhat at length.

Our courts have substantially followed the rules enunciated by Chancellor KENT in the leading case of *Leonard v. Vredenburg*, 8 Johns 29, respecting the matter in hand. [See *Peck v. Harris*, 57 Mo. App. 1. c. 470.] The third class of cases there referred to, and which are held not to be within the statute, are said to be cases "when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." But it has been more than once observed that this language, taken as a working rule,

would mean that any independent consideration for such a promise would suffice to take the contract out of the statute. If there is no present consideration for the promise it is a mere *nudum pactum* and unenforceable regardless of the statute. The purpose of the statute is to render certain contracts invalid, if not in writing, which would otherwise have been valid. [See *Martin v. Harrington*, supra.] In *White v. Rentoul*, 108 N. Y. 222, it is said that this statement in *Leonard v. Vredenburg* is "dangerously broad and capable of grave misapprehension." But where the promise is in terms an absolute promise to pay the debt, and the new consideration is one of *benefit* to the promisor, which is the motive for the making thereof, it seems that the case may properly be held to be taken out of the operation of the statute. In such event the undertaking is independent in character, and founded upon the special benefits accruing thereby to the promisor. This is the doctrine of *Nelson v. Boynton*, 3 Met. 396, where the rule derived from the earlier cases was stated by Chief Justice SHAW (l. c. 402). It was adopted by this court in the early case of *Walther v. Merrill*, 6 Mo. App. 370, in an opinion by BAKEWELL, J. It does not appear that our Supreme Court has in terms so stated the rule, but, as pointed out by Judge ELLISON, in *Martin v. Harrington*, supra, it is in effect the view reflected in *Besshears v. Rowe*, 46 Mo. 501. In this connection see *Kansas City Sewer Pipe Co. v. Smith*, 36 Mo. App. 608; *Browne*, Statute of Frauds (5 Ed.), sec. 212 *et seq.*

In the case before us defendant's promise was made in consideration that plaintiff would not take the mules from the possession of defendant's employee, who was using them for defendant, for some months. It distinctly appears that this was of benefit to defendant, and that it was the motive for his promise; that his object was to promote his own interest, and not merely to relieve Hodge from the obligation in question. We

are of the opinion that the agreement was valid, under the circumstances, though not in writing, and that defendant should be required to respond thereupon.

Furthermore the contract made between plaintiff and defendant, based upon the new consideration aforesaid, was fully performed on the part of plaintiff. The evidence discloses that plaintiff, in reliance upon defendant's promise, refrained from taking possession of the mules in accordance with his agreement. Our courts have repeatedly held that "complete performance of a contract by one contracting party forecloses his adversary from interposing the Statute of Frauds as his defense." [See *Hedden v. Schneblin*, 126 Mo. App. 1. c. 485, 104 S. W. 887; *Chenoweth v. Express Co.*, 93 Mo. App. 185; *Johnson v. Reading*, 36 Mo. App. 1. c. 315, affirmed in *Nally, Admr. v. Reading*, 107 Mo. 350, 17 S. W. 978; *Bless v. Jenkins*, 129 Mo. 1. c. 657, 31 S. W. 938; *Hale v. Stuart*, 76 Mo. 20.]

The agreement was either to pay the debt or cause the mules to be returned to plaintiff, according to the latter's testimony. But this was an undertaking to pay the balance due upon the note, either in cash or in property to be accepted in payment thereof. No point is made respecting the valuation placed upon the mule delivered to plaintiff, which amount was credited upon the note; and this phase of the matter need not be noticed.

Appellant complains of the one instruction given at plaintiff's request, for the reason that it required the jury to find, among other things, that in consideration of defendant's promise plaintiff released Hodge and in his stead accepted defendant as the debtor, defendant consenting thereto; and that the evidence did not support this part of the instruction. But in this the instruction merely required the jury to find more than was essential to plaintiff's recovery. Furthermore an instruction given at defendant's request proceeds along precisely the same lines, and defendant is not in a posi-

tion to complain of plaintiff's instruction. The instruction assailed does require the jury to find that "the said promise of J. C. McHaney (if made) was in consideration of some benefits accruing directly to him."

Plaintiff's instruction told the jury that if they found for plaintiff their verdict should be for the sum of \$140.32; this being the amount remaining unpaid upon the note with interest computed thereupon. It is argued that the court committed reversible error in computing the interest and thus instructing the jury as to the amount of the recovery. Such was formerly the rule of decision in this State, but in the recent case of McCormick Harvesting Machine Co. v. Blair, 181 Mo. App. 593, 164 S. W. 656, we held to the contrary, following the decision of the Supreme Court in Beekman Lumber Co. v. Havester Co., 215 Mo. 221, 114 S. W. 1087.

However, it does appear that plaintiff did not pray for interest upon the balance alleged to be due upon the note. The prayer is for judgment for \$129.30, the amount alleged to be due and unpaid, with costs. Plaintiff cannot recover more than the amount for which he sues. The evidence authorizes a recovery of \$129.30, but no interest may be added thereto.

If plaintiff within ten days will remit the sum of \$11.02 the judgment below will be affirmed; otherwise it will be reversed and the cause remanded. *Reynolds, P. J., and Nortoni, J., concur.*

W. F. SHELTON, JR., Appellant, v. MARGARET L.
LENTZ et al., Respondents.

St. Louis Court of Appeals, July 2, 1915.

1. **CONSTITUTIONAL QUESTIONS: Manner of Raising: Pleading.** The mere allegation that an ordinance is "unreasonable, arbitrary, unconstitutional, and void," without pointing out the particular provision or provisions of the Constitution asserted to have been violated thereby, raises no constitutional question.
2. **BUILDING RESTRICTIONS: Threatened Violation of Municipal Ordinance: Injunctions: Persons Entitled to Sue.** The general rule is, that equity will not interfere to restrain the violation of a municipal ordinance nor to prevent the commission of a crime, at the instance of a citizen who suffers no special or peculiar injury from the doing of the act sought to be restrained, different from that suffered by any other citizen, and will not, at a suit of a city, restrain a threatened violation of an ordinance thereof regulating the erection of buildings for the purpose of affording greater security against loss by fire, nor will a suit in equity lie at the instance of an individual, when brought solely for the enforcement of the ordinance, and not because of any special or peculiar damage to him; but where it appears that the erection of a building, in express violation of a valid municipal ordinance, will work special and peculiar injury of an irreparable nature to the plaintiff, he may maintain a suit in equity to enjoin the erection thereof.
3. ———: ———: ———: ———. In an action by an owner of a frame structure, adjoining a proposed brick veneer building and within fifty feet thereof, and of other wooden structures erected prior to the enactment of an ordinance establishing limits and prohibiting the erection of veneer buildings therein, to enjoin the erection of the proposed building, on the ground that the erection of that kind of building was forbidden by the ordinance, *held* that, in view of the fact that the proposed building would contain more combustible material than would buildings permitted by the ordinance, and would increase the danger of damage by fire to plaintiff's buildings and increase insurance rates thereon, plaintiff suffered peculiar and special damage, entitling him to injunctive relief.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker*, Judge.

REVERSED AND REMANDED (*with directions*).

Jones & Jones for appellant.

The court erred in dissolving the temporary writ of injunction and overruling plaintiff's motion for new trial: (1) Because the Board of Aldermen of the city of Kennett had the express power to pass an ordinance establishing fire limits and regulating the kind and character of buildings to be erected within such limits in conformity with law. R. S. 1899, sec. 5958, Laws 1895, page 65; R. S. 1909, sec. 9372. (2) Because the ordinance as passed by the Board of Aldermen was in conformity with the law and charter of the city of Kennett and was a reasonable exercise of its power, and was in pursuance of express legislative authority. (a) Ordinances passed under express legislative authority are not unreasonable and where the reasonableness of a municipal ordinance is in issue all reasonable doubts are resolved in favor of the municipality. A large and liberal discretion is allowed municipal authorities. *State ex rel. v. Clifford*, 228 Mo. 194; *Morse v. Westport*, 110 Mo. 508; *St. Louis v. Weber*, 44 Mo. 550; *Stafford v. Railroad*, 110 Wis. 331; *St. Louis v. Kellman*, 235 Mo. 693; *Waterworks Co. v. Webb City*, 78 Mo. App. 422; *Chimine v. Baker*, 75 S. W. 330; 28 Cyc. 389; *Doniphan v. White*, 110 Mo. App. 507; *Tarkio v. White*, 120 Mo. 9; *St. Charles v. Elsner*, 155 Mo. 681; *Skinker v. Heman*, 148 Mo. 355; *Centralia v. Smith*, 103 Mo. App. 438; *Eichenlaub v. St. Joseph*, 113 Mo. 405. (b) Private encroachments upon public rights are not to be favored by construction. *Elec. Light Co. v. Alpena*, 130 Mich. 413; *Traverse City Gas Co. v. Traverse City*, 130 Mich. 17; *Philadelphia v. Western Union*, 11 Phil. (Pa.) 327; *Stafford v. Railroad*, 110 Wis. 331; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624; *Danville Water Co. v. Danville*, 180 U. S. 619; *Freeport Water Co. v. Freeport*, 180 U. S.

587; 28 Cyc. 388; Kerz v. Water Co., 139 Ill. App. 598. (3) Because the permit granted by the board to Mrs. Lentz is invalid and constituted no defense, being by mere entry upon council record, and wholly unauthorized. Chimine v. Baker, 75 S. W. 330; 28 Cyc. 387; Eichenlaub v. St. Joseph, 113 Mo. 402; Zimmerman v. Railroad, 154 Mo. App. 296; Ristine v. Clements, 31 Ind. App. 338; People v. Latham, 203 Ill. 9; Trenton v. Coyle, 107 Mo. 194; Saxton v. Beach, 50 Mo. 488; Saxon v. St. Joseph, 60 Mo. 158; Thompson v. Boonville, 61 Mo. 283; People v. Mount, 186 Ill. 560; Railroad v. Chicago, 174 Ill. 439; Hearst's Chicago American v. Spiss, 117 Ill. App. 436; Terre Haute v. Lake, 43 Ind. 480; Michael v. Trenton, 163 Ala. 425. (4) Because plaintiff below and appellant here was an adjoining property owner and as such had a special interest in the enforcement of the fire ordinance which will afford him injunctive relief. Zimmerman v. Railroad, 154 Mo. App. 301; Schopp v. St. Louis, 117 Mo. 131; Caskey v. Edwards, 128 Mo. App. 239; Cummings v. St. Louis, 90 Mo. 259; Atterbury v. West, 139 Mo. App. 180; Chimine v. Baker, 75 S. W. 330.

Fort & Zimmerman for respondent.

(1) Respondent's demurrer to the petition should have been sustained, because it states no facts authorizing injunctive relief. A proceeding by injunction is a civil action and the defendant must necessarily be subject to a civil liability, yet a municipal ordinance cannot create a civil liability against a person violating it and in favor of persons injured by its violation, for this is a power which belongs alone to the sovereign power of the State. The only liability which attaches to the infraction of such an ordinance is the penalty it imposes. Moran v. Company, 134 Mo. 650; Loth v. Company, 197 Mo. 357; Carpenter v. Company, 103 Mo. App. 498. (2) Injunction will not lie to restrain,

or prevent, the erection of a building within the fire limits of a city, forbidden by municipal ordinance. Warren v. Cavanaugh, 33 Mo. App. 102; Mason v. Deitering, 132 Mo. App. 26; Rice v. Jefferson, 50 Mo. App. 464; Caskey v. Edwards, 128 Mo. App. 241. (3) Respondent concedes that the permit issued to her authorizing her to build the house mentioned in this suit was of no legal validity and is no defense in this suit. R. S. 1909, sec. 9372; Eichenlaub v. City, 113 Mo. 395-403; Dougherty v. City, 110 Mo. App. 626.

ALLEN, J.—This is a suit in equity to enjoin the erection of a “brick veneer” building within the fire limits of the city of Kennett, Missouri, *contrary* to the provisions of an ordinance of said city. Defendant Mrs. Lentz is the owner of lot 43 of block 12 of the city of Kennett, and at the time of the institution of this suit was proceeding to erect thereupon a building of the character mentioned, and had partly constructed the same. Plaintiff is the owner of property in this block and of other buildings in the vicinity. The court below issued a temporary injunction, but upon a hearing upon the merits found the issues in favor of defendants, dissolved the temporary injunction and dismissed plaintiff’s bill; whereupon plaintiff appealed to this court.

The building which Mrs. Lentz was proceeding to erect was to consist of a wooden frame-work placed upon a concrete foundation, with the outer walls thereof veneered with brick, i. e., having one layer of brick outside of and coating the frame structure. A municipal ordinance prohibits, within a certain district, the erection of any frame building or of any building “the outer walls of which shall be composed in whole or in part of wood” or of any building “the outer walls of which shall be veneered or faced with metal or brick (commonly called brick-veneer.)” And it is admitted that the building whose erection is sought to be re-

strained is situated within the fire limits as fixed by ordinance, being in the extreme southwest corner thereof.

It appears that block 12 is bounded upon the west by Jackson street, which extends north and south, upon which lot 43 fronts; and that this block extends east to Main street. The evidence is that plaintiff owns a frame building in block 12, fronting upon Jackson street, about fifty feet from the building here in question, and it also appears that he owns two frame buildings on the east side of block 12 fronting upon Main street, as well as other property in an adjoining block. Plaintiff's frame buildings are old buildings which were erected prior to the extension of the fire limits to include this portion of the city.

Though the erection of a building of the character mentioned, within the fire limits aforesaid, is forbidden by ordinance, Mrs. Lentz obtained a so-called permit from the municipal authorities purporting to authorize her to erect such a building; and having obtained this she proceeded with the erection thereof until halted by the issuance of the temporary injunction.

The action proceeds upon the theory that plaintiff will suffer a peculiar and irreparable injury by the erection of the building in question, in that it will greatly endanger his property, depreciate the value thereof and increase the insurance thereupon. Such are the allegations of the petition; and it is alleged that the legal authorities of the city have refused to prohibit the violation of the ordinance forbidding the construction of such buildings within the fire limits, and that plaintiff is without remedy at law.

The answer admits that defendant, Mrs. Lentz, is proceeding to erect a building of the character mentioned in the petition, upon the premises in question, but avers that she is within her legal rights in so doing and that plaintiff is not entitled to the relief sought.

After admitting the existence of the ordinance pleaded in the petition, and that the building in question is within the fire limits of the city, it is averred that the ordinance prohibiting the erection within such fire limits of any "brick veneer" building is "unreasonable, arbitrary, unconstitutional and void, and that the city of Kennett in passing said ordinance went beyond the power granted to it by its charter and did not exercise such powers as were granted to it in a reasonable manner."

The record does not disclose the theory pursued by the trial court in dismissing plaintiff's bill. There is no constitutional question in the case. If there were, as a matter of course, we would have no jurisdiction. There is no point made here that we are without jurisdiction by reason of the fact that a constitutional question is involved; and such point would not be good if made for the reason that the answer of defendants below was not such as to raise any constitutional question. The mere allegation that the ordinance is "unreasonable, arbitrary, unconstitutional and void," without pointing out the particular provision or provisions of the Constitution asserted to have been violated thereby, raises no constitutional question whatsoever.

It may be said, however, that the ordinance here involved is altogether unlike that passed upon by the Supreme Court in *Hays v. City of Poplar Bluff*, 263 Mo. 516, 173 S. W. 676, which purported to make it unlawful, within certain established fire limits, to construct buildings of a certain character without having obtained special permission from the mayor and city council. The ordinance before us upon its face purports to prohibit absolutely the erection of buildings of the character mentioned therein, within fire limits. But it appears that the city authorities sometimes granted "permits" to property owners to erect buildings in violation of the ordinance, at least in certain

sections within the fire limits. And a permit was so issued to the defendant, Mrs. Lentz, in the instant case. That such a permit is a nullity and constitutes no defense to this action is conceded by respondents in their brief before us.

Respondents contend that an injunction will not lie to restrain the erection of the building in question, though the same is being erected confessedly in violation of the municipal ordinance aforesaid. It may be conceded that the general rule is that equity will not interfere to restrain the violation of a municipal ordinance, nor to prevent the commission of a crime, at the instance merely of a citizen who suffers no special or peculiar injury from the doing of the act sought to be restrained, different from that suffered by any other citizen. As a rule a court of equity will not, at a suit of the city, restrain a threatened violation of an ordinance thereof regulating the erection of buildings, for the purpose of affording greater security against loss by fire. [See *First Nat'l. Bank at Mount Vernon v. Sarlls, et al.*, 129 Ind. 201, 1. c. 203, 204, 13 L. R. A. 481, 28 Am. St. Rep. 85, and authorities cited.] Nor will a suit in equity lie at the instance of an individual when brought solely for the enforcement of the ordinance and not because of any special or peculiar damage threatened to the plaintiff. [*Caskey v. Edwards*, 128 Mo. App. 237, 107 S. W. 37; *Mason v. Deitering*, 132 Mo. App. 26, 111 S. W. 862; *Bank v. Sarlls, supra.*]

However, the great weight of authority is to the effect that where it appears that the erection of a building, in express violation of a valid municipal ordinance, will work special and peculiar injury of an irreparable nature to the plaintiff, he may maintain a suit in equity to enjoin the erection thereof, and that "it is only when the injury is general, and public in its effects, and no private right is violated, in contradistinction to the rights of the rest of the public, that in-

dividuals are precluded from bringing private suits for the violation of their individual rights." [Banks v. Sarlls, *supra*, l. c. 204.] [See, also, Banks v. Dworak, — Nebr. —, 5 L. R. A. (N. S.), 493; Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368; Griswold v. Brega, 160 Ill. 390, 52 Am. St. Rep. 350; Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7.]

In Banks v. Dworak, *supra*, the latest of the cases cited above, in discussing this question it is said:

"It may be conceded that the municipal authorities and a citizen of the village who suffers no special damage from the violation of an ordinance cannot ordinarily have the assistance of a court of equity to enjoin a threatened violation thereof. The reason is plain. In the case under consideration the village authorities may, without judicial authority and on their motion, tear down a wooden building erected in violation of an ordinance fixing the fire limits, and a private citizen, though not specially damaged, may institute a proceeding to enforce the penalty provided by such ordinance. [Lemmon v. Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986 and authorities cited.] Their remedy at law is full and adequate. The facts stated in the appellee's petition, and which are admitted by the demurrer, show that he would sustain special damage not suffered by the public at large in consequence of the proposed removal of the house to the near vicinity of his own residence. In such cases equity will interfere to protect him against the threatened injury." [Citing Bank v. Sarlls and Griswold v. Brega, *supra*.]

Respondents cite the decision of this court in Warren v. Cavanaugh, 33 Mo. App. 102, and that of the Kansas City Court of Appeals in Rice v. Jefferson, 50 Mo. App. 464, as authority in support of their contention that equity will not interfere in a case of this character.

Warren v. Cavanaugh, *supra*, was a suit to restrain the opening of a stone quarry, upon the ground that the same was forbidden by a municipal ordinance of the city of St. Louis. It is said in the opinion that it nowhere appeared that the quarry was or would become a nuisance, and that the petition alleged no special or peculiar injury to the plaintiff. It is further said, however, that equity will not interfere where there is a violation of a municipal ordinance except where the act sought to be prohibited will result in the creation of a nuisance *per se*.

In Rice v. Jefferson, *supra*, it was sought to restrain the violation of a municipal ordinance such as that here in question, viz., one forbidding the erection of buildings of a certain character within prescribed fire limits. It was held, in an opinion by GILL, J., to which is added an opinion by SMITH, P. J., in passing upon the motion for rehearing, that the action would not lie. But little appears regarding the nature of the injury suffered by the plaintiff therein, though it does appear that he was the owner of real property within the same block. The defendant had previously been tried before the city authorities for the alleged violation of the ordinance in question, had been found not guilty, and discharged; and this fact is more than once adverted to in the course of the original opinion. But the opinion appears to hold that injunctive relief may not be had in any event, in a case of such character, unless the structure prohibited by municipal regulation was such as to constitute a nuisance *per se*.

The theory that equity will interfere only where the proposed structure will constitute a nuisance *per se* is, we think, unsound and at discord with the great weight of authority on the question. In Bank v. Sarlls, *supra*, l. c. 204, it is said:

“Some of the authorities above cited affirm that to warrant the application of the restraining power to prevent the erection of buildings in violation of a city

ordinance, the act sought to be restrained must be a nuisance in fact, and not one created solely by statutory enactment, or municipal ordinance.

"We can see no good reason for the distinction. Where it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows in addition that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction."

This doctrine may be regarded now as well established by the authorities, and it appears to be sound upon principle. To the extent therefore that the opinion in *Warren v. Cavanaugh*, *supra*, and *Rice v. Jefferson*, *supra*, are at variance therewith, they should not be and have not been followed. The doctrine that equity will not, in any event, interfere to restrain the doing of an act prohibited by municipal ordinance unless the result thereof is to create a nuisance *per se*, has been distinctly disapproved by the Kansas City Court of Appeals in *Caskey v. Edwards*, 128 Mo. App. 237, 107 S. W. 37, where, in an opinion by ELLISON, J., the rule announced in *Bank v. Sarlls*, *supra*, is followed, that case being cited in support thereof. Likewise this court, in *Mason v. Deitering*, 132 Mo. App. 26, 111 S. W. 862, hold that it was not essential that the prohibited act be such as to create a nuisance *per se*. Thus it will be seen that the later rulings of this court and the Kansas City Court of Appeals are in accord with the current of authority on this question.

In the case note to *Banks v. Dworak*, *supra*, in 5 L. R. A. (N. S.) 493, it is said:

"The courts are nearly all in accord with *Banks v. Dworak*, upon the proposition that the erection of buildings in violation of a municipal ordinance will be enjoined at the suit of an adjoining property holder who is able to show separate and irreparable injury

to himself or to his property." [Citing cases to which we have referred above.]

Later, in the same note, it is said that there are but two cases which in any way throw doubt upon the principles of law to be gathered from the decision cited, one being *Rice v. Jefferson*, *supra*, and the other *Stilwell v. Writing Academy*, 21 Abb. N. C. 472, 4 N. Y. Supp. 414. Of *Rice v. Jefferson*, it is said:

"It does not appear from the opinion in this case that there was any claim of special damage, but such may be inferred from a perusal of plaintiff's brief (bottom of p. 466.) This decision is further interesting in that it seems to hold that no injunction would lie in any event, whether special damage be shown or not, to restrain anything forbidden by law that was not a nuisance *per se*."

The question remains whether or not the evidence shows such a special and peculiar injury resulting to plaintiff from the threatened erection of this building as to bring his case within the rule stated above. An examination of the record has convinced us that there is a sufficient showing as to this. Plaintiff is the owner of a frame structure upon the property adjoining that of the defendant, Mrs. Lentz, and within fifty feet of the building in question, and is the owner of other wooden structures in the block. The evidence is to the effect that the building sought to be prohibited will contain much more combustible material than buildings of the character permitted by the ordinance, and will increase the danger of damage by fire, particularly to defendant's building standing in close proximity thereto, and there is evidence that the erection of such a building will increase the rate of insurance upon plaintiff's property. This, we think, shows a peculiar injury, different from that sustained by the public at large, entitling plaintiff to maintain this action. [See *Griswold v. Brega*, 160 Ill. 490; *Banks v. Dworak*,—Neb. — 5 L. R. A. (N. S.), 493; *Horstman, et al. v.*

Young, 13 Phila. 19.] It is true, as respondents assert, that plaintiff's frame building may likewise endanger this "brick-veneer" building; but this is not to be reckoned, for the reason that when plaintiff's building was erected it was lawful to construct such a structure upon plaintiff's property, the fire limits then not having been extended to include this portion of the city.

We are therefore of the opinion that the learned chancellor below was in error in holding that plaintiff could not maintain the action and in dismissing plaintiff's bill. The judgment will therefore be reversed and the cause remanded, with directions to the circuit court to enter a decree for plaintiff restraining the erection or maintenance by defendants of the building complained of, upon the premises in question. It is so ordered. *Reynolds, P. J., and Nortoni, J., concur.*

**WILLIAM R. HUMPHREYS, Respondent, v. ST.
LOUIS & HANNIBAL RAILWAY COMPANY,
Appellant.**

St. Louis Court of Appeals, July 2, 1915.

1. **COMMON CARRIERS: Maintenance of Stock Pens: Duty of Carrier.** A carrier must exercise ordinary care to maintain its stock pens in a reasonably safe condition to prevent injury to, or the escape of, animals placed therein by a shipper for shipment.
2. ———: ———: ———: **Notice to Carrier.** A carrier is liable for the value of live stock which escape from a stock pen maintained by it, although no actual notice of the fact that the stock had been placed in the pen, awaiting shipment, was given it, where a custom obtains between the carrier and shippers, operating as an invitation on the part of the carrier to deliver stock in the pen without giving it express notice thereof.
3. ———: ———: ———: ———: **Sufficiency of Evidence.** In an action against a carrier for the value of hogs which escaped from a stock pen maintained by the carrier, where they

Humphreys v. St. Louis & Hannibal Railroad.

had been placed by the shipper, awaiting a car to load them on, evidence *held* sufficient to warrant a finding that the carrier knew the hogs were in the pen, awaiting shipment; *held, further*, that whether the shipper was guilty of contributory negligence, because he knew the pen to be more or less defective, was a question for the jury.

4. ———: ———: **Duty of Carrier: When Duty Commences.** Where live stock is delivered in a stock pen maintained by a carrier, for shipment, the obligation of the carrier with respect to the safety of the stock attaches immediately upon the delivery, for such is accessory to the carriage; and this is true although the shipper is to call later to load the stock on a car.
5. ———: ———: **Escape of Live Stock: Instructions: Failure to Submit Specific Negligence.** In an action against a carrier for damages for the loss of hogs which escaped through a stock pen fence maintained by the carrier, while awaiting shipment, where the petition alleged that the stock pen had become defective through the carelessness of the carrier, in that posts, planks, and nails used in the construction of the inclosure were suffered by defendant to become so rotted, rusted, worn, wasted and weakened as to render them insufficient to protect against the escape of the hogs, an instruction authorizing a recovery on a mere finding that the carrier failed to keep its pens in a safe and secure condition and by reason thereof hogs of the shipper escaped and were lost, was erroneous, because it did not limit a recovery to the specific acts of negligence alleged in the petition.
6. **NEGLIGENCE: Instructions: Necessity of Submitting Specific Negligence.** In a negligence action, an instruction authorizing a recovery by plaintiff without requiring a finding on the specific acts of negligence counted on is erroneous.
7. **INSTRUCTIONS: Omissions: Cure by Other Instructions.** Where an instruction given for the plaintiff, which covers the whole case and authorizes a verdict for him, omits to require facts to be found that are essential to a recovery, the error cannot be cured by another instruction given for him, which is sufficient with respect to the matter omitted.
8. **COMMON CARRIERS: Maintenance of Stock Pens: Duty of Carrier: Instructions.** In an action against a carrier for damages for the loss of live stock which escaped from a stock pen maintained by the carrier, while awaiting shipment, an instruction, that it was the duty of the carrier to keep its stock pens in a reasonably safe condition, was erroneous, since the law only requires carriers to exercise ordinary care to that end.
9. ———: **Loss of Live Stock: Damages: Interest.** Where live stock is lost by escaping from a stock pen maintained by a

Humphreys v. St. Louis & Hannibal Railroad.

carrier, while awaiting shipment, the shipper is entitled to interest on the value of the stock, from the date of institution of a suit to recover damages; overruling *Reading v. Railroad*, 188 Mo. App. 41.

10. ———: *Carriage of Live Stock: Liability.* A carrier is an insurer of live stock which it undertakes to carry, save against the act of God or the public enemy, carelessness of the shipper, or vicious propensities of the stock.
11. **PLEADINGS: Prayer of Petition: Interest.** A recovery may not be had for an amount in excess of the prayer of the petition, and, in order to recover interest, the prayer should ask for it.

Appeal from Lincoln Circuit Court.—*Hon. B. H. Dyer*,
Judge.

REVERSED AND REMANDED.

R. L. Sutton, J. D. Hostetter and G. C. Huston for
appellant.

(1) There was no evidence tending to show that defendant or its agent had any notice or knowledge of the delivery of plaintiff's hogs into its stock pens, and no liability of defendant attached with reference to them prior to the escape of the hogs alleged to have been lost. *Merriam v. Railroad*, 20 Conn. 354; *Williams v. Peytavin*, 4 Mart. (La.) 304; *Grosvenor v. Railroad*, 39 N. Y. 34; *Blachard v. Isaacs*, 3 Barb. (N. Y.) 388; *Ball v. New Jersey Steamboat Co.*, 1 Daly (N. Y.) 491; *O'Bannon v. Southern Express Co.*, 51 Ala. 481; *Wells v. Railroad*, 51 N. C. 47; *Lackland v. Railroad*, 101 Mo. App. 420; *Holland v. Railroad*, 139 Mo. App. 716; *Travy v. Railroad*, 80 Mo. App. 392; *Holland v. Railroad*, 163 Mo. App. 252; *Reading v. Railroad*, 165 Mo. App. 129; *Reading v. Railroad*, 173 S. W. 452; *Packard v. Getman*, 6 Cow. 757; *Milne v. Railroad*, 155 Mo. App. 470. (2) Plaintiff's instruction numbered 3 was erroneous in that it enlarged the issues beyond the specific negligence alleged in the petition, and permitted the jury to draw upon its im-

agination with respect to the grounds of liability. *Reading v. Railroad*, 165 Mo. App. 123; *Black v. Railroad*, 217 Mo. 672; *Bank v. Murdock*, 62 Mo. 73; *Mansur v. Botts*, 80 Mo. 658; *Zachra v. American Mfg. Co.*, 159 Mo. App. 96; *Gibler v. Railroad*, 148 Mo. App. 475, 487; *Lowenstein v. Railroad*, 110 Mo. App. 686; *McManamee v. Railroad*, 135 Mo. 447; *Bamberge v. Supreme Tribe Ben Hur*, 159 Mo. App. 101. (3) The plaintiff, in his efforts to prove his own case, clearly showed himself guilty of such contributory negligence as to bar a recovery, and it was the plain duty of the court to so declare as a matter of law. *Lackland v. Railroad*, 101 Mo. App. 427; *Railroad v. Law*, 68 Ark. 218; *Chapin v. Railroad*, 79 Ia. 582; *Susong v. Railroad*, 115 Ga. 361; *Hutchinson v. Railroad*, 37 Minn. 524; *Lee v. Railroad*, 72 N. C. 236; *Betts v. Farmers L. & T. Co.*, 21 Wis. 80; *Newby v. Railroad*, 19 Mo. App. 391; *Allen v. St. Louis Transit Co.*, 183 Mo. 424; *Ramp v. Railroad*, 133 Mo. App. 703; *Border v. Sedalia*, 161 Mo. App. 638. (4) Moreover, if plaintiff could not be declared guilty of contributory negligence as a matter of law, at least there was ample evidence to go to the jury upon this issue, introduced, solely by plaintiff in his efforts to make out his case, and the court erred in refusing to submit the issue to the jury as requested by defendant in its instruction numbered 4, and in ignoring the issue in instructions numbers 1 and 3 given on behalf of the plaintiff. *Lackland v. Railroad*, 101 Mo. App. 427; *Railroad v. Law*, 68 Ark. 218; *Chapin v. Railroad*, 79 Ia. 582; *Susong v. Railroad*, 115 Ga. 361; *Hutchinson v. Railroad*, 37 Minn. 524; *Lee v. Railroad*, 72 N. C. 236; *Betts v. Farmers L. & T. Co.*, 21 Wis. 80; *Newby v. Railroad*, 19 Mo. App. 391; *Allen v. St. Louis Transit Co.*, 183 Mo. 424; *Ramp v. Railroad*, 133 Mo. App. 703; *Border v. Sedalia*, 161 Mo. App. 638. (5) The allowance of interest on the damages claimed is reversible error. *Reading v. Railroad*, 173 S. W. 452. (6) There was mani-

fest error in excluding the defendant's record of way bills, kept in the regular course of business at its Troy station. This evidence was both competent and relevant. *Wright v. Railroad*, 118 Mo. App. 392; *Greenleaf on Evidence* (16 Ed.), sec. 563, page 698; 1 *Elliott on Evidence*, sec. 208; *Leschen v. Brazelle*, 164 Mo. App. 415; 10 *Encyclopedia of Evidence*, page 719; *Railroad v. Zapp*, 209 Ill. 339; *Lyons v. Corder*, 253 Mo. 549. (7) The petition does not state facts sufficient to constitute a cause of action against defendant. See authorities cited under point 1.

John L. Burns for respondent.

(1) Defendant had invited plaintiff to deliver his hogs into its pens on that day and it was the duty of defendant to make the pens reasonably safe, in default of which, it was liable for the damages sustained. *Mason v. Railroad*, 25 Mo. App. 480; *Tracey v. Railroad*, 80 Mo. App. 392; *Cooke v. Railroad*, 57 Mo. App. 478; *Kincaid v. Railroad*, 62 Mo. App. 365; *McCulough v. Railroad*, 34 Mo. App. 23; *Paddock v. Railroad*, 60 Mo. App. 339; *Reading v. Railroad*, 165 Mo. App. 128; *Lackland v. Railroad*, 101 Mo. App. 420; *Holland v. Railroad*, 163 Mo. App. 251. (2) There was no error in giving plaintiff's instruction, numbered 3. It must be read in connection with the other instructions, and being so read, the jury could not possibly be misled thereby. The only way in which the pens could be unsafe or insecure so as to permit the escape of the hogs, would be because of defects in the materials, planks or posts out of which the pens were constructed, as specified in the petition, and in instruction numbered 1 given for plaintiff and in the "evidence given in the case" as this instruction required. There is no warrant to the jury to "rove" in finding defendant's negligence. The case is entirely different from the *Reading* case and others cited by appellant. There was no "evi-

Humphreys v. St. Louis & Hannibal Railroad.

dence" in the case from which any defects could be found, except those specified in the petition. Where instructions taken as a whole, present the facts properly to the jury, they should be given, although one of them standing alone would be erroneous. *Heinzle v. Railroad*, 213 Mo. 102; *Leise v. Meyer*, 143 Mo. 547; *Flaherty v. St. Louis Transit Co.*, 207 Mo. 318; *Chambers v. Chester*, 172 Mo. 461; *Shores v. St. Joseph*, 134 Mo. App. 9; *Evers v. Wiggins Ferry Co.*, 127 Mo. App. 236; *Senn v. Railroad*, 135 Mo. 512. (3) There was no error in the refusal of defendant's instruction numbered 4 for various good and sufficient reasons. (a) Contributory negligence is an affirmative defense and must be pleaded before plaintiff is required to take any notice of it in his instructions. *Borders v. Railroad*, 168 Mo. App. 172; *Peperknorn v. Railroad*, 154 S. W. 836; *Benjamin v. Railroad*, 245 Mo. 598; *Donovan v. Railroad*, 89 Mo. 147; *Stone v. Hunt*, 94 Mo. 475; *Mosman v. Bender*, 80 Mo. 579; *Collett v. Huhman*, 243 Mo. 585. (b) The instruction, numbered 4, imposes upon plaintiff the burden of guarding his hogs after delivery of the same to defendant for carriage, whereas it was the duty of defendant to either provide proper pens to retain the hogs or else to otherwise restrain them, and not the duty of plaintiff to do so. *Reading v. Railroad*, 165 Mo. App. 128. (c) The instruction is further faulty in that it imposes upon plaintiff the burden of passing upon the sufficiency of the pen at his peril. *Sloan v. Railroad*, 58 Mo. 221; *Potts v. Railroad*, 17 Mo. App. 394; *Mason v. Railroad*, 25 Mo. App. 480; *Tracy v. Railroad*, 80 Mo. App. 389, 392. (d) The instruction further imposes an excessive burden on plaintiff for the reason that plaintiff is denied the right to recovery, if he knew that hogs "could" escape, that is, that it was possible for them to escape, whereas he is only chargeable if the defects were so glaring and obvious that a reasonably prudent man would have refused to put hogs in the

pen. Reading v. Railroad, 165 Mo. App. 129. (5) It was proper to allow interest from the day suit was filed. This in effect is a suit for the loss of the hogs *in toto*, not for damages. It is not true that in all actions *ex delicto* interest is denied. From the beginning of our jurisprudence in this State, interest has been allowed for goods lost by carriers. Gray v. Packet Co., 64 Mo. 47; Dunn v. Railroad, 68 Mo. 268; Goodman v. Railroad, 71 Mo. App. 460; Lachner Bros. v. Express Co., 72 Mo. App. 13. (6) There was no error in excluding defendant's record of way bills offered in evidence. This evidence was both incompetent and irrelevant. They are not carbon copies, and do not stand on the same footing as carbon copies. Neither are they books of account within the meaning of the statutes, R. S. 1909, sec. 6355, or within the shopbook rule at common law. Traber v. Hicks, 131 Mo. 189; Haas v. Hicks, 131 Kan. 787; 1 Greenleaf on Evidence, secs. 117-119; Jones on Evidence (2 Ed.), secs. 209 & 225; Seibert v. Ragsdale, 103 Ky. 206; Smith v. Brown, 151 Mass. 338; Westinghouse Co. v. Tilden, 56 Neb. 129. Neither do the press book copies purport to be complete copies of the waybill, so as to be admissible as secondary evidence of the waybill or bill of lading. An inspection of the proffered evidence will show that no property is described and that most of the important features of the bills are absent. They are, in other words, obviously not full copies of any document whatever and are not admissible as copies under the secondary evidence rule. 17 Cyc., pages 517, 518; McKelvey on Evidence, secs. 164-166; Kyser v. Railroad, 56 Iowa, 207. (7) The petition states a good cause of action. See authorities cited under point 1 of this brief. Especially after a verdict is rendered, in the absence of any demurrer. Bowie v. Kansas City, 51 Mo. 454, 461; Munchow v. Munchow, 96 Mo. App. 553; Scamell v. Transit Co., 103 Mo. App. 504; Winn v.

Railroad, 245 Mo. 406; Morrison v. Railroad, 162. Mo. App. 662.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of the alleged negligence of defendant. Plaintiff recovered and defendant prosecutes the appeal.

Defendant is a common carrier and as such maintains a station and stock pens at Troy, Missouri. Plaintiff delivered eighty-seven fat hogs to defendant in its stock pens, with a view of loading them on a car for shipment, and five of the hogs escaped through a defective fence. The hogs were lost and the suit proceeds for their value.

It appears that the fence of the stock pen was defective and had been so for several months. Some of the posts were rotted and the boards were insecurely nailed thereto. Because of this defective condition, it is said the five hogs escaped from the pen and were lost to plaintiff.

There can be no doubt that the law casts an obligation on a common carrier of live stock to exercise ordinary care to the end of maintaining its pens for the reception of stock in a reasonably safe condition, so as to prevent the injury or escape of the animals placed therein by a patron for shipment. [See Reading v. Chicago, B. & Q. R. Co., 165 Mo. App. 123, 145 S. W. 1166; Lackland v. Chicago & A. R. Co., 101 Mo. App. 420, 74 S. W. 505; Mason v. Mo. Pac. R. Co., 25 Mo. App. 473; Holland v. Chicago R. I. & P. R. Co., 163 Mo. App. 251, 146 S. W. 1181; 1 Hutchinson on Carriers (3 Ed.) (M. & D.), sections 114, 115.]

But it is argued it should appear the carrier knew the hogs were delivered in the pen or otherwise the obligation in respect of them may not be invoked, and, no doubt, this is generally true. However, express notice to the carrier is not always essential. If a conventional arrangement otherwise appears, or if a practice

or custom obtains between the carrier and its patron, so as to operate as an invitation on the part of the carrier to the shipper to deliver the stock in the pen for shipment, without express notice concerning the fact, this will suffice. [See 1 Hutchinson on Carriers (3 Ed.) (M. & D.), section 115.]

It is true there is no direct evidence that plaintiff notified defendant's agent the hogs were in the pen in the early part of the day, though the evidence is, the agent issued a bill of lading covering the transportation of eighty-two of the number to St. Louis, that evening. It appears that plaintiff was engaged in the business of buying and shipping stock and as such was a regular patron of defendant. He delivered hogs and cattle frequently to defendant in the identical pen at Troy, for shipment, and defendant accepted such shipments as tendered. On the day previous to the shipment involved here, plaintiff ordered a car from defendant's agent at Troy to transport hogs to St. Louis, and this car was provided by defendant for that purpose on the day the hogs were placed in the pen.

The evidence is, that the stock pen is near defendant's depot, where the agent maintained his office, and on its property. Several hours were consumed in receiving the hogs, weighing them and placing them in the pen. Having placed the hogs in the pen, plaintiff returned to his home to await the arrival of the car, later in the day, into which they were to be loaded, and, during the time, five of them escaped. Plaintiff returned in the evening, loaded the remainder in the car—that is, eighty-two head of hogs,—and received a bill of lading from the agent. Though the evidence is meager, it was competent for the jury to find from these facts that defendant knew the hogs were placed in the pen for shipment. Certainly such may be inferred from what appears. Especially is this true in view of the fact that plaintiff frequently shipped hogs from that place and followed the usual course in order-

ing the car from the agent the day before. Obviously, defendant invited him to make the delivery, accordingly, and should be regarded, after verdict on these facts, as if it knew that he did so. This being true, defendant's obligation with respect to the safety of the hogs attached immediately on the delivery in the pen, for such was accessory to the carriage. [See *Mason v. Mo. Pac. R. Co.*, 25 Mo. App. 473.] This is true, too, though plaintiff was to call later in the day and load the hogs in the car, for, in the interim, after delivery in the pen, under such circumstances, the obligation to protect against their escape obtained. [See *Holland v. Chicago, R. I. & P. R. Co.*, 163 Mo. App. 251, 146 S. W. 1181.] The matter of plaintiff's contributory negligence, because he knew the pen to be more or less defective, was likewise a question for the jury.

The petition avers that the stock pen had become defective through the carelessness of defendant, in that the posts and planks and nails used in the construction of the inclosure were suffered by defendant to become so rotted, rusted, worn, wasted and weakened as to render them insufficient to protect against the escape of the hogs.

Plaintiff's first instruction submitted the negligence relied upon and required a finding of the facts alleged concerning the same. But the third instruction given at his request is general in character and purports to cover the whole case, in that it authorizes a verdict for plaintiff on the finding of the matters therein recited. His third instruction is as follows:

"The court instructs the jury, that if it has been proven to your satisfaction by the evidence given in the case that the defendant railroad was a common carrier for the purpose of carrying freight, especially hogs, from its stock pens near its railroad station in Troy, Missouri, to intermediate points on its railroad on the date alleged in its petition, to-wit, the 23rd day

of March, 1911, and that it did receive and transport this kind of freight for hire at and about that time, then it was the duty of said defendant to keep its stock yards or stock pens at Troy, Missouri, in a reasonably safe and secure condition for the purposes intended; and now if you believe and find from the evidence, that on said date, to-wit, the 23rd day of March, 1911, that the plaintiff herein delivered to the defendant for shipment to St. Louis, Missouri, eighty-seven head of hogs and that the defendant received said hogs for shipment and put them or had them put or suffered them to be put in its stock pens for shipment over its road and while they were in said pens of defendant, the defendant failed to keep its pens in which they were in a safe and secure condition and by reason of its failure so to do, five of plaintiff's hogs escaped from said pens and were lost to plaintiff, then the law is that the defendant must be responsible to the plaintiff for the value of said hogs so lost as shown by the evidence, provided your verdict, if you find for the plaintiff, shall not exceed \$62.16 with interest thereon at six per cent from the date of the filing of this suit to-wit, the 2nd day of September, 1911."

This instruction authorized a finding for plaintiff, without regard to the specific averments of negligence contained in the petition, on a mere finding that "the defendant failed to keep its pens in which they were in a safe and secure condition and by reason of its failure so to do five of plaintiff's hogs escaped from said pens and were lost to plaintiff." This is insufficient under the established rule of decision which obtains in the Supreme Court, for that such a general instruction is said to permit the jurors to evolve any theory of negligence they may imagine and cast liability against defendant on grounds other than those set forth in the petition. [See Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 S. W. 583; Beave v. St. Louis Transit Co., 212 Mo. 331, 111 S. W. 52.] We

condemned a similar instruction in a case of like character recently in *Reading v. Chicago, B. & Q. R. Co.*, 165 Mo. App. 123, 145 S. W. 1166.

Although plaintiff's first instruction is well enough, in that it submits the specific negligence relied upon in the petition, the third instruction above copied may not be treated as aided thereby. On this question the most recent ruling in the Supreme Court goes to the effect that where plaintiff's instruction authorizing a verdict for him covers the whole case but omits a ground of negligence essential to his recovery, such may not be cured by another one of plaintiff's instructions, which is amply sufficient with respect to the matter omitted. [See *Hall v. Coal & Coke Co.*, 260 Mo. 351, 168 S. W. 927.] Furthermore, the instruction says "it was the duty of defendant to keep its stock-yards in a reasonably safe condition" whereas the law requires it to exercise ordinary care to that end only.

The instruction above copied authorizes, too, the recovery of interest at six per cent on the value of the hogs lost from the date of filing the suit. It is argued this was error as declared in *Reading v. Chicago, B. & Q. R. Co.*, 188 Mo. App. 41, 173 S. W. 451, but we are not so persuaded. On reconsideration, we conclude that interest may be recovered in cases where the suit proceeds, as here, on the common-law liability of the common carrier for the loss of property in its possession for transportation, if other elements of liability are present. Indeed, such seems to be the general rule on the subject as stated by Mr. Hutchinson in his work on Carriers. [See Vol. 3 (3 Ed.) (M. & D.), section 1360.] In such cases the author thus states the rule on the measure of damages:

"It is well settled that the measure of the damages for the loss of the goods by the carrier, when he is liable for such loss, is generally the value of the goods at the destination to which he undertook to carry

them, with interest on such value for the time when the goods should have been delivered, deducting, however, the unpaid cost of transportation, but adding such incidental damages as naturally and proximately flow from the loss. This, at least in the great majority of cases, will be the extent of the loss of the shipper, and of the compensation for its breach, which it may be reasonably supposed was in the contemplation of the parties at the time of the making of the contract."

In this State, it is established by the prior course of decision that interest is recoverable in cases of this character, as a matter of right. Generally speaking, such interest is to be recovered from the time the property should be delivered at the point of destination. However, where the suit is instituted subsequent to that time, it is competent to give interest on the value of the property lost, from the date of the institution of the suit, as was decided by the Supreme Court in *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268. [See, also, *Gray v. Mo. R. Packet Co.*, 64 Mo. 47; *Lachner Bros. v. Adams Express Co.*, 72 Mo. App. 13, 21; *Goodman v. Missouri, K. & T. R. Co.*, 71 Mo. App. 460, 464; *Smith v. Whitman*, 13 Mo. 352.]

The broad statement that interest may not be recovered in actions *ex delicto* is not warranted by the authorities. Indeed, the statute (section 5430, R. S. 1909) authorizes the jury, "if they shall think fit," to give damages in the nature of interest, over and above the value of the goods, in suits for conversion. Under this statute, it is said that interest is recoverable in a suit *ex delicto* as for conversion, if the jury sees fit to give it, but not as a matter of right. [See *State ex rel. v. Hope*, 121 Mo. 34, 25 S. W. 893; see, also, *Lack v. Brecht*, 166 Mo. 242, 65 S. W. 976.] There are other cases where it is said to be improper to allow interest on damages recovered on the ground of negligence alone as where property is destroyed through the negligent setting out of a fire by a locomotive. [See *De-*

Steiger v. Hannibal & St. J. R. Co., 73 Mo. 33; Atkinson v. Atl. & Pac. R. Co., 63 Mo. 367.] So, too, the rule is declared that interest may not be recovered on the amount of damages suffered through the negligent killing of stock on a railroad. [See Meyer v. Atl. & Pac. R. Co., 64 Mo. 542.] Also, in Gerst v. St. Louis, 185 Mo. 191, 211, 84 S. W. 34, involving a suit for damages to real estate, it is said that interest is not recoverable on damages in actions *ex delicto*, where no pecuniary benefit could accrue by reason of the injury.

But, after all, none of these cases purports to disapprove the rule above stated, that interest may be recovered on the amount of damages suffered in suits of the character here in judgment. The cases last above pointed out treat with the question concerning unliquidated damages in actions of tort, generally speaking. But the rule with respect to common carriers of freight we apprehend stands on an entirely different footing, so as to segregate the damages which accrue from a loss by such carriers into a separate class as appears throughout the law. Indeed, a common carrier is an insurer of inanimate freight, save against the act of God or the public enemy, and is an insurer, too, with respect to live stock in his custody for transportation, save against the act of God, the public enemy, the carelessness of the shipper, or the vicious propensities of the animals themselves. This being true, the carrier is required to deliver the goods intact, except as above stated, and in event of his failure, he is required to respond for such value and interest thereon from the time the delivery should be made at the point of destination. This is true, too, Mr. Hutchinson says, where the goods have not been lost or destroyed, but are delivered only in a depreciated condition, attributable to causes for which the carrier is responsible. Even in such cases, the measure of damages is the difference, after deducting the cost of transportation, between their value as actually delivered and

as they should have been delivered, including interest and other matters pointed out by the author. [See 3 Hutchinson on Carriers (3 Ed.), section 1362.]

But be this as it may, the rule of decision in this State is well established to the effect that interest is recoverable in suits of this character against the common carrier on the value of the property lost, as above stated. [See *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268; *Gray v. Mo. R. Packet Co.*, 64 Mo. 47; *Lachner Bros. v. Adams Express Co.*, 72 Mo. App. 13, 21; *Goodman v. Missouri, K. & T. R. Co.*, 71 Mo. App. 460, 464.] The authority of these cases is in nowise impaired by more recent decisions, so far as we have been able to discover. What was said, therefore, on this question in *Reading v. Chicago, B. & Q. R. Co.*, 188 Mo. App. 41, 173 S. W. 451, should be, and is, disapproved.

But a recovery may not be had for an amount in excess of the prayer. The petition says nothing as to interest, whereas it should pray for it. [*Shockley v. Fischer*, 21 Mo. App. 551; *Van Riper et al. v. Morton, et al.*, 61 Mo. App. 440, 444; *Farrell v. Fire Ins. Co.*, 66 Mo. App. 153.]

The judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

INDEX.

BY T. E. FRANCIS.

(Cases are inserted in the order received by the publisher.)

ABBREVIATIONS. See *Principal and Agent*, 4.

ACCORD AND SATISFACTION. See *Executors and Administrators*, 6.

ACTION. See *Banks*, 1, 2; *Res Adjudicata*, 1.

1. **Joinder of Parties: Maker and Guarantor.** A maker and a guarantor of a contract may be sued jointly. *Cockrell v. Williams*, 246.

AMINISTRATION. See *Executors and Administrators*.

ADMISSIONS. See *Tender*, 1.

APPELLATE PRACTICE. See *Attorney and Client*, 1; *Carriers of Passengers*, 7; *Divorce*, 9, 10; *Insurance*, 2; *Instructions*, 5; *Life Insurance*, 7, 10; *New Trial*; *Statute of Frauds*, 8; *Trial Practice*, 2, 3; *Witnesses*, 2.

1. **Conclusiveness of Finding.** In an action at law tried to the court, the appellate court is bound by the trial court's finding on all questions of fact, if supported by substantial evidence and in accordance with the law. *Egger v. Wilcox*, 31.
2. **Conclusiveness of Verdict.** A verdict supported by substantial evidence is conclusive on the appellate court. *Pfeifer v. Supreme Tribe*, 38.
3. **Erroneous Admission of Evidence: Harmless Error.** The erroneous admission of evidence will not work a reversal, where the party complaining of its admission could not have been prejudicially affected by it. *Schuler v. Life Ins. Co.*, 52.
4. **Conclusiveness of Verdict.** A verdict rendered on conflicting evidence is conclusive, on appeal, where the jury are properly instructed as to the law. *Ib.*
5. **Review: Weight of Evidence.** An objection that the verdict is against the weight of the evidence is for the consideration of the trial court, not the appellate tribunal. *Ib.*
6. **Erroneous Admission of Evidence: Harmless Error.** In an action on a life insurance policy, the erroneous admission in evidence of a conversation between insured and a deceased agent of insurer was not prejudicial to defendant, where it was merely cumulative to other evidence of the same fact testified to beyond question and was brought in only casually. *Ib.*

APPELLATE PRACTICE—Continued.

7. **Matters of Exception: Prerequisites to Review.** Matters of exception cannot be reviewed unless they are preserved by a timely motion for a new trial, and the action of the court in overruling such motion must appear in that part of the abstract called the record proper. *Clark v. Clark*, 278.
8. **Conclusiveness of Finding.** When the record before the appellate court discloses sufficient evidence to sustain plaintiff's claim of employment and that he performed the services required thereunder, so far as a judgment based on said evidence is concerned, it will be presumed, on appeal, that the court reached the correct result. *Paine v. O'Donnell*, 300.
9. **Disposition of Case on Appeal: Findings.** The appellate court cannot find facts essential to sustain a judgment rendered under an erroneous view of the law by the trial court, which did not find such facts. *Coleman v. Dana*, 370.
10. **Review: Rulings on Demurrer to Evidence.** In reviewing the refusal of the trial court to direct a verdict for defendant, the appellate court must view the evidence in the light most favorable to plaintiff. *Jaggi v. Ins. Co.*, 384.
11. **Binding Effect of Trial Theory.** Even where a cause originates in a justice's court, a party cannot try his case on one theory in the circuit court, on appeal from the justice, and on another theory in the Court of Appeals. *Ib.*
12. **Same.** In an action on an industrial life insurance policy, instituted in a justice's court and appealed to the circuit court, where it was tried *de novo*, insurer not having, in the latter court, raised the point that plaintiff was not within any of the classes in the "facility of payment" clause in the policy and hence had no capacity to sue, would not be heard on such point in the Court of Appeals. *Ib.*
13. **Law of Case.** A decision by the Supreme Court is the law of the case and is binding on a Court of Appeals, on a subsequent appeal. *Schmidt v. United Order of Foresters*, 415.
14. **Remarks of Trial Court: Review.** An appellate court will not interfere, where the court below has refused to grant a new trial because of remarks of the court in the hearing of the jury, alleged to have been prejudicial to the complaining party, unless it is convinced, from an examination of the whole record, that the remarks were of such a character as to constitute prejudicial error. *Copeland v. Ins. Co.*, 435.
15. **Same.** The matter of granting a new trial on account of remarks made by the trial court during the trial rests almost exclusively within the sound discretion of that court, and hence, although such remarks are not such as would have justified the appellate court in reversing the judgment, had the motion for a new trial been overruled, nevertheless where the trial court grants a new trial on account thereof, such order will not be interfered with, on appeal, unless the trial court palpably abused its discretion in making it. *Ib.*
16. **Same.** On appeal from an order granting a new trial on account of remarks made by the trial court during the trial, *held* that, although the remarks were not such as would have justi-

APPELLATE PRACTICE—Continued.

fied a reversal of the judgment, had the motion for a new trial been overruled, nevertheless it was within the power of the trial court to grant a new trial on account thereof, and, in view of the fact that the evidence was evenly balanced and that the verdict was concurred in by nine jurors only, the appellate court could not say that the trial court palpably abused its discretion in granting a new trial. *Ib.*

17. **New Trial: Scope of Review.** While trial courts are vested with a wide discretion in granting new trials, yet a new trial, granted under a mistake of law, will be reversed, on appeal, unless it can be upheld on some other ground of the motion. *Sparkman v. R. R.*, 463.
18. **Review of Findings: Rulings on Motion for New Trial.** Where one of the grounds of a motion for a new trial was based on affidavits as to remarks of plaintiffs' counsel in opposing defendants' request for a directed verdict, which defendants claimed prejudiced the jury against them, and plaintiffs filed affidavits by all the jurors stating that they did not hear the remarks, which were addressed to the court in an undertone, the trial court's denial of the motion precluded a review of this matter, on appeal. *O'Brien v. Heman*, 477.
19. **Conclusiveness of Finding.** In an action at law tried to the court, a finding on conflicting evidence is conclusive on the appellate court. *Stone v. Fry*, 607.
20. **Admission of Evidence: Harmless Error.** The admission of evidence concerning facts that cannot be made the predicate of liability is not prejudicial error, where the adverse party establishes the same facts and the jury are not charged that they may base a verdict thereon. *Thomure v. R. R.*, 640.
21. **Invited Error: Instructions.** A party will not be heard to complain, on appeal, of an instruction given for his adversary, where an instruction given at his request proceeds along precisely the same lines. *Moore v. McHaney*, 686.

ASSIGNMENTS. See *Contracts*, 8; *Evidence*, 7.

ATTACHMENTS. See *Fraudulent Conveyances*, 1.

Attachment Bond: Authority of Agent to Execute: Ratification. The administrator of Mullett brought this action on attachment bond, which was executed by the defendant's manager at the time an attachment suit was instituted by defendant company against Mullett. The defendant denies liability on the bond on the ground that the execution thereof was never authorized nor thereafter ratified. *Held*, that the defendant by pressing the litigation, of which the bond is a part, ratified the execution of the bond. *State ex rel. v. Parke-Davis & Co.*, 219.

ATTORNEY AND CLIENT.

1. **Contracts: Claims Against Estates.** When the record before the appellate court discloses sufficient evidence to sustain plaintiff's claim of employment and that he performed the services required thereunder, so far as a judgment based on said evidence is concerned, it will be presumed, on appeal, that the court reached the correct result. *Paine v. O'Donnell*, 300.

ATTORNEY AND CLIENT—Continued.

2. **Authority of Attorney.** The acts of an attorney in representing one client do not bind another client for whom he was not acting at the time. *McManus v. Burrows*, 594.

AUTOMOBILES. See *Master and Servant*, 11, 12, 13, 14; *Negligence*, 2, 3, 4, 5; *Parent and Child*, 8.

BANKRUPTCY.

Setting Aside Nonfraudulent Transfers: Right of Action by Trustee. Under the Bankruptcy Act of July 1, 1898 (Ch. 541, sec. 70, 30 Stat. at Large, 565), providing that the trustee in bankruptcy shall be vested with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all property transferred by him in fraud of creditors, and authorizing him to avoid any transfer by the bankrupt which any creditor might have avoided, and recover the property so transferred, or its value, a trustee is vested with title to property transferred by the bankrupt only where the transfer is in fraud of the bankrupt's creditors, and may avoid a transfer by the bankrupt only when a creditor, in a proper proceeding, might have avoided it in his own favor; and hence a trustee in bankruptcy of a corporation, which had purchased its own stock with corporate funds, may not recover from the seller on mere proof that the seller knew, or had reasonable grounds to believe, that corporate funds were used for the purchase of the stock, but he must show that the payment for the stock was fraudulent as against creditors of the corporation. *Coleman v. Dana*, 370.

BANKS.

1. **Checks: Privity Between Payee and Bank.** There is no privity of contract between a payee of an ordinary check and the bank upon which it is drawn, and hence the payee cannot maintain an action *ex contractu* against the bank for the amount of the check. *Kansas City Casualty Co. v. Bank*, 287.
2. **Same: Action Ex Contractu: Ex Delicto.** A payee of a check may maintain an action *ex delicto*, in conversion against the bank on which it is drawn, where the latter permits an agent of such payee, without authority, to endorse the check to it and places the amount to the agent's individual credit. *Ib.*
3. **Same: Conversion: Measure of Damages.** Bank checks are property and may be converted; and prima facie, the amount of the check is the measure of damages in an action for conversion. *Ib.*
4. **Same: Endorsement: Authority of Agent.** A travelling salesman for a wholesale grocery house with authority to sell and receive cash payments and also checks payable to the wholesale house, has no authority to endorse such check. And a bank accepting such endorsement and paying the money is guilty of a conversion. *Ib.*
5. **Same.** The fact that a travelling salesman for a wholesale house with authority to collect cash for sales and to receive checks payable to the house, deposits the cash with a bank to his individual credit and then checks it out to the house is not evidence sufficient to show that such salesman has, without authority, also endorsed its name on checks and deposited them to his own credit. *Ib.*

BILL OF INTERPLEADER. See *Interpleader*.

BILLS AND NOTES. See *Banks; Principal and Agent, 6.*

1. **Liability of Endorser: Presentment: Waiver.** The plaintiff presented a demand against the defendant estate on a promissory note which was executed by Young and his wife to the deceased defendant and endorsed by the deceased defendant to plaintiff. *Held*, that presentment for payment is not required in order to charge an endorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented. *Belch v. Roberts*, 243.
2. **Same.** When an endorser promises to pay a note with full knowledge of the facts, he is deemed to have waived the requirement of presentment for payment and notice. *Ib.*
3. **Signature by More Than One.** A note reading that "I, John Smith promise to pay to," etc., and signed by Smith and another is the note of both. *Cockrell v. Williams*, 246.
4. **Collateral: Amount of Recovery: Burden of Proof.** In an action against the maker on notes endorsed by the payee to the plaintiff before maturity, as collateral security for a debt, the payee owes the plaintiff, if the maker has a good defense against the payee, the plaintiff can only recover the amount of the secured debt. And the burden is on him to show the amount of such debt. *Fifth-third National Bank v. McCrory*, 295.
5. **"Accommodation Party: Primary Liability.** An "accommodation party," defined by Sec. 10000, R. S. 1909, as one who has signed the instrument as a maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person, and who, by that section, is made liable to a holder for value, notwithstanding the holder, at the time of taking the instrument, knew he was only an accommodation party, is primarily liable to the holder, under section 10161, which provides that a person primarily liable on an instrument is one who, by the terms thereof, is absolutely required to pay the same. *Night & Day Bank v. Rosenbaum*, 559.
6. **Same: Effect of Extending Time of Payment.** An accommodation indorser of a promissory note can be discharged only by the discharge of the note in accordance with Sec. 10089, R. S. 1909, since he is primarily liable thereon, under Secs. 10000 and 10161, R. S. 1909, and hence an agreement binding the holder to extend the time of payment, although made without the assent of the indorser, does not release the indorser from liability. *Ib.*
7. **Payment: Renewal Note.** In order that one note may operate as payment of another, there must be an understanding between the parties to that effect, and, in the absence of such an understanding, the renewal note amounts to no more than an agreement on the part of the holder that if it is paid at maturity, the original indebtedness shall be satisfied, and, in the interim, he assumes an obligation, if consideration appear, to await payment until the maturity of the renewal note. *Ib.*
8. **Accommodation Party: Payment: Renewal Note.** The principal maker of a promissory note, which bore an accommodation

BILLS AND NOTES—Continued.

endorsement, executed a renewal note, but the payee retained the original note as collateral, pursuant to an agreement with the principal maker, but without the knowledge of the accommodation indorser. *Held*, that, under Sec. 10089, R. S. 1909, stating under what circumstances a negotiable instrument is discharged, the renewal note was not a payment of the original note, and did not discharge the accommodation indorser from liability on the original note, on the failure of the principal maker to pay the renewal note. *Night & Day Bank v. Rosenbaum*, 559.

9. **Same: Pledge of Note to Secure Renewal Note: Effect.** The principal maker of a promissory note, which bore an accommodation indorsement, executed a renewal note, but the payee retained the original note as collateral, pursuant to an agreement with the principal maker, but without the knowledge of the accommodation indorser. *Held*, that the principal maker did not, by this transaction, become the "holder" of the note, within Sec. 10160, R. S. 1909, and hence the note was not discharged, under the fifth subdivision of Sec. 10089. *Ib*.
10. **"Holder."** Under Sec 10160, R. S. 1909, defining the word "holder" as meaning the payee or indorsee of a bill or note, who is in possession of it, or the bearer of it, in order to constitute one the "holder" of a promissory note, he must be in possession or the holder of it. *Ib*.

BONDS. See *Principal and Surety*.

BROKERS. See *Insurance*, 5, 6, 7, 8.

BUILDING CONTRACTS. See *Principal and Surety*, 1.

BUILDING RESTRICTIONS.

1. **Threatened Violation of Municipal Ordinance: Injunctions: Persons Entitled to Sue.** The general rule is, that equity will not interfere to restrain the violation of a municipal ordinance nor to prevent the commission of a crime, at the instance of a citizen who suffers no special or peculiar injury from the doing of the act sought to be restrained, different from that suffered by any other citizen, and will not, at a suit of a city, restrain a threatened violation of an ordinance thereof regulating the erection of buildings for the purpose of affording greater security against loss by fire, nor will a suit in equity lie at the instance of an individual, who brought solely for the enforcement of the ordinance, and not because of any special or peculiar damage to him; but where it appears that the erection of a building, in express violation of a valid municipal ordinance, will work special and peculiar injury of an irreparable nature to the plaintiff, he may maintain a suit in equity to enjoin the erection thereof. *Shelton v. Lentz*, 699.
2. **Same.** In an action by an owner of a frame structure, adjoining a proposed brick veneer building and within fifty feet thereof, and of other wooden structures erected prior to the enactment of an ordinance establishing limits and prohibiting the erection of veneer buildings therein, to enjoin the erection of the proposed building, on the ground that the erection of that kind of building was forbidden by the ordinance, *Held* that, in view of the fact that the proposed building would contain more combustible material than would buildings permitted by the

BUILDING RESTRICTIONS—Continued.

ordinance, and would increase the danger of damage by fire to plaintiff's buildings and increase insurance rates thereon, plaintiff suffered peculiar and special damage, entitling him to injunctive relief. *Ib.*

CARRIERS OF PASSENGERS.

1. **Injury to Passenger: Premature Start of Railroad Train: Sufficiency of Evidence.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, *held*, under the evidence, that the case was for the jury. *Thomure v. R. R.*, 640.
2. **Same: Evidence: Inferences.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, plaintiff's testimony, that the starting of the train caused her to lose her balance and fall from the step, was sufficient to warrant an inference that the train was caused to start and move forward suddenly. *Ib.*
3. **Same: Right of Recovery.** Where the conductor of a railroad train, having reason to believe that a passenger who has reached his destination has not alighted, and, though dilatory, may be in the act of alighting, starts the train without examination or inquiry, and the passenger is in the act of alighting when the train is started, and is thereby injured, the railroad company is liable. *Ib.*
4. **Same: Instructions: Submission of immaterial issues.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, *held* that the real point to be determined was whether plaintiff had been allowed a reasonable time in which to alight from the train, and as that was submitted to the jury and they found for plaintiff, whether or not other averments in her petition, or even included in the instructions, were supported by substantial evidence, was immaterial. *Ib.*
5. **Same: Instructions.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, the court instructed, at the instance of plaintiff, that if the jury believed from the evidence that plaintiff was a passenger on the defendant's train, having paid her fare, "then in that event it was the duty of defendant to exercise the highest practical care to carry plaintiff safely to her destination, and it was the duty of defendant's agents and servants to stop the train at plaintiff's destination a reasonable time to allow plaintiff, by the exercise of ordinary care, to alight from said train in safety before it started; and in ascertaining what would be a reasonable time, the jury should consider plaintiff's age, sex, physical condition and all the facts and circumstances bearing upon the question; and if defendant's agents and servants started said train while plaintiff was proceeding, in the exercise of ordinary care, to alight from said train, and before she had a reasonable time to alight therefrom in safety, then such starting of said train was an act of negligence on the part of defendant and a breach of its duty to plaintiff as a passenger on its road." *Held*, that the instruction properly covered the case. *Ib.*

CARRIERS OF PASSENGERS—Continued.

6. **Same: Instructions.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train while she was in the act of alighting from it, the petition alleged that, before the train had stopped for a reasonable and sufficient length of time to allow plaintiff, using due diligence, to alight therefrom in safety, and while plaintiff was in the act of alighting therefrom, defendant, by or through its agents, negligently caused the train to be started forward with a sudden jerk, without any warning, thereby causing plaintiff to be thrown to the ground. *Held*, that an instruction requested by defendant, to the effect that if the jury found that the train stopped a reasonable length of time for plaintiff to alight, and that the train was started while she was in the act of alighting therefrom, and started and moved slowly, and did not start with a sudden jerk and bound, and she was caused to fall by reason of the starting, the verdict should be for defendant, was properly refused, since its effect would have been to narrow the issue to the fact of a start with "a sudden jerk and bound," and to eliminate the real issue, namely, whether or not the train was started before a reasonable time had been allowed plaintiff to alight—the manner in which the train was started, whether with a jerk or otherwise, being immaterial. *Thomure v. R. R. Co.*, 640.
7. **Same: Evidence: Admission: Harmless Error.** In an action by a passenger for injuries sustained by reason of the premature starting of a railroad train, while she was in the act of alighting from it, the admission of evidence that there was no step-box at the steps when plaintiff attempted to alight, was not reversible error, where defendant's own testimony showed that the box had been removed before plaintiff attempted to alight and no instructions basing liability on the absence of the box were given. *Ib.*

CHILDREN. See *Minors*.

CIRCUIT COURTS. See *Justices' Courts*, 1.

CITIES. See *Municipal Corporations*.

COMMON CARRIERS.

1. **Injury to Shipper: Negligence of Engine Hostler: Scope of Employment.** A shipper told the station agent the freight car he was to use in shipping his household goods was not in a convenient place. The agent said to see the engine hostler and get him to place the car where he desired. The hostler told his helper to take a freight engine standing in the yard and "spot" the car. He did so first in front of the shipper's house and afterward on a storage track in front of the shipper's shop. This track was never used for loading cars. After the hostler's helper had spotted the car on the storage track and the shipper began loading his goods, the hostler helper uncoupled the engine and went about his regular duties coaling and caring for the engine. He then stored it, as was his duty, on the track, and in doing so struck the car and injured the shipper who was loading his goods. *Held*, that even if the spotting of the car was outside the scope of the hostler helper's duties and in violation of his master's orders, yet when he did the injury he was clearly acting for his master and in the line of his duty, and knowing or having reason to believe the shipper was in the car he had no right to negligently injure him, and if he did so his master was liable. *Fellhauer v. R. R.*, 137.

COMMON CARRIERS—Continued.

2. **Same: Contributory Negligence.** Since it was not conclusively shown that the shipper knew it was in violation of the master's rules to place the car where it was, and since the shipper knew the servant was aware of his presence in the car, he had a right to assume that the servant would not negligently strike the car with his engine and injure him. Hence the shipper was not guilty of contributory negligence in not keeping a watch outside the car for the engine or in attempting to load the car at that point. *Ib.*
3. **Carriage of Live Stock: Liability.** While, in order to establish liability against a carrier for injury to a shipment of live stock, it is not necessary to prove negligence on the part of the carrier by direct evidence, it is essential to show a state of facts or circumstances from which negligent conduct on its part may be inferred. *Botts v. R. R.*, 676.
4. **Same.** A carrier is relieved of liability for failure to deliver live stock in good condition only by the act of God or the public enemy, the fault of the shipper, or the inherent vice of the stock. *Ib.*
5. **Same.** Where the negligence of a carrier contributes to cause injury to a shipment of live stock, the carrier is liable therefore, although the condition of the weather or the act of God is a contributory cause. *Ib.*
6. **Same: Sufficiency of Evidence.** In an action against a carrier for damages for the death of hogs shipped on a warm day, evidence that the hogs were sound and healthy when delivered to the carrier, that the car in which they were loaded was allowed to stand in its yards for some time, that twelve hogs, out of a shipment of eighty-three, were dead within four hours after they were loaded, and one died the next morning, together with opinion evidence, to the effect that the proportion of loss was unparalleled in that locality, and that, if the car had been kept moving, the hogs would not have died, was sufficient to warrant a finding that the carrier was negligent, notwithstanding it wet the car and furnished the hogs with water while the car was standing. *Ib.*
7. **Limitations on Liability: Consideration.** A provision in a bill of lading, requiring the shipper to give the carrier notice of any claim on account of loss of or injury to the shipment, as a condition precedent to a right of recovery, is invalid, unless supported by a separate consideration independent of the regular transportation charge. *Ib.*
8. **Same.** A recital in a shipping contract, that the shipment is made under the lesser of two rates which are held out to the public, will, in the absence of evidence to the contrary, and where it does not appear that the regular tariff rate was exacted, be regarded as sufficient, *prima facie*, to show an independent consideration for a limitation upon the carrier's liability. *Ib.*
9. **Same: "Tariff Rate."** A bill of lading, which required the shipper to give special notice of claims, recited, whereas the carrier transports live stock at less than its tariff rates when its liability is limited by contract, that it was agreed that the carrier would transport one carload of stock as per tariff and rules in effect on date of shipment, at the through rate of tariff per

COMMON CARRIERS—Continued.

- car, the same being a special rate less than the regular tariff rate applying on shipments not covered by the special conditions. The bill of lading mentioned no other tariff. *Held*, that the expression "tariff rate" meant the usual rate, and hence the bill of lading showed no reduction affording a consideration to give validity to the special condition requiring notice. *Botts v. R. R. Co.*, 676.
10. **Injury to Live Stock: Excessiveness of Recovery.** In an action against a carrier for the death of hogs shipped, *held*, under the evidence, that the jury did not award a recovery for hogs dying after the shipment had passed beyond defendant's line. *Ib.*
 11. **Maintenance of Stock Pens: Duty of Carrier.** A carrier must exercise ordinary care to maintain its stock pens in a reasonably safe condition to prevent injury to, or the escape of, animals placed therein by a shipper for shipment. *Humphreys v. R. R.*, 710.
 12. **Same: Notice to Carrier.** A carrier is liable for the value of live stock which escape from a stock pen maintained by it, although no actual notice of the fact that the stock had been placed in the pen, awaiting shipment, was given it, where a custom obtains between the carrier and shippers, operating as an invitation on the part of the carrier to deliver stock in the pen without giving it express notice thereof. *Ib.*
 13. **Same: Sufficiency of Evidence.** In an action against a carrier for the value of hogs which escaped from a stock pen maintained by the carrier, where they had been placed by the shipper, awaiting a car to load them on, evidence *held* sufficient to warrant a finding that the carrier knew the hogs were in the pen, awaiting shipment; *held, further*, that whether the shipper was guilty of contributory negligence, because he knew the pen to be more or less defective, was a question for the jury. *Ib.*
 14. **Same: Duty of Carrier: When Duty Commences.** Where live stock is delivered in a stock pen maintained by a carrier, for shipment, the obligation of the carrier with respect to the safety of the stock attaches immediately upon the delivery, for such is accessory to the carriage; and this is true although the shipper is to call later to load the stock on a car. *Ib.*
 15. **Same: Escape of Live Stock: Instructions: Failure to Submit Specific Negligence.** In an action against a carrier for damages for the loss of hogs which escaped through a stock pen fence maintained by the carrier, while awaiting shipment, where the petition alleged that the stock pen had become defective through the carelessness of the carrier, in that posts, planks, and nails used in the construction of the inclosure were suffered by defendant to become so rotted, rusted, worn, wasted, and weakened as to render them insufficient to protect against the escape of the hogs, an instruction authorizing a recovery on a mere finding that the carrier failed to keep its pens in a safe and secure condition and by reason thereof hogs of the shipper escaped and were lost, was erroneous, because it did not limit a recovery to the specific acts of negligence alleged in the petition. *Ib.*
 16. **Same: Duty of Carrier: Instructions.** In an action against a carrier for damages for the loss of live stock which escaped

COMMON CARRIERS—Continued.

from a stock pen maintained by the carrier, while awaiting shipment, an instruction, that it was the duty of the carrier to keep its stock pens in a reasonably safe condition, was erroneous, since the law only requires carriers to exercise ordinary care to that end. *Ib.*

17. **Loss of Live Stock: Damages: Interest.** Where live stock is lost by escaping from a stock pen maintained by a carrier, while awaiting shipment, the shipper is entitled to interest on the value of the stock, from the date of institution of a suit to recover damages; overruling *Reading v. Railroad*, 188 Mo. App. 41. *Ib.*
18. **Carriage of Live Stock: Liability.** A carrier is an insurer of live stock which it undertakes to carry, save against the act of God or the public enemy, carelessness of the shipper, or vicious propensities of the stock. *Ib.*

CONFLICT OF LAWS. See *Life Insurance*, 6, 7.

CONSTITUTIONAL QUESTIONS.

Manner of Raising: Pleading. The mere allegation that an ordinance is "unreasonable, arbitrary, unconstitutional, and void," without pointing out the particular provision or provisions of the Constitution asserted to have been violated thereby, raises no constitutional question. *Shelton v. Lentz*, 699.

CONTRACTS. See *Banks; Bills and Notes; Corporations*, 1; *Executors and Administrators*, 6; *Municipal Corporations*, 9, 12; *Principal and Agent; Principal and Surety; Sales; Statute of Frauds.*

1. **Construction: Question for Court.** The construction of a contract of sale, evidenced by correspondence between the parties, is for the court. *Grocer Co. v. Pillman*, 15.
2. **Action for Breach: Sufficiency of Evidence.** In an action for damages for the breach of a contract, it was shown that defendant contracted to convey to plaintiff certain real estate subject to two deeds of trust, one of which was to secure an indebtedness of \$1000, less forty dollars, which had been paid, payable at the rate of forty dollars per month, but that the deed of trust was actually given to secure eleven notes for forty dollars each, due monthly, and one note for \$560, due in twelve months. Plaintiff testified that, upon discovering the true facts respecting the maturity of the indebtedness, which was after the deed conveying the property subject to the deeds of trust had been made and after he had paid one or more of the forty dollar notes, he refused to pay any more of the notes, because of his inability to handle the \$560 note at maturity, and the deed of trust was foreclosed and the property sold; but it was shown that a certificate of title, showing the true facts respecting the indebtedness, was delivered to plaintiff or his agent, before the deed was made. *Held*, that these facts warranted a finding that there was no breach of contract by defendant. *Egger v. Wilcox*, 31.
3. **Contract for Benefit of Third Person: Validity Privity.** A contract between two parties upon a valid consideration may be enforced by a third party when entered into for his benefit,

CONTRACTS—Continued.

although such third party is not named in the contract and was not a party to the consideration. It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim. But this does not extend so far as to give a third person who is only indirectly and incidentally benefited by the contract a right to sue upon it. *Uhrich v. Surety Co.*, 111.

4. **Joint Action.** A maker and a guarantor of a contract may be sued jointly. *Cockrell v. Williams*, 246.
5. **Substitution: Consideration.** When a later contract is substituted for an earlier one the withdrawal of the first and substitution of the second are themselves a consideration. *Koslosky v. Bloch*, 257.
6. **Same: In Part.** Where one is already legally bound by his contract to perform a certain service a later contract involving only one item of the first contract is not a substitution of one contract for another. *Ib.*
7. **Additional Compensation: Consideration.** Where one is already legally bound by his contract to perform a certain service, a later contract agreeing to pay him a larger compensation for that service is without consideration. *Ib.*
8. **Explanation of Consideration Clause: Parol Evidence.** The consideration clause of an assignment of a contract, reciting that, "for value received," the contract was assigned, was not contractual in its nature, and hence was open to explanation by parol, so that the assignee, who, by the terms of the assignment, assumed the obligations of the assignor under the contract, had the right to maintain an action to recover an amount which he claimed the assignor agreed to pay him as consideration for the assignment. *Heagy v. Cox*, 377.
9. **Contract for Repurchase of Corporate Stock Sold: Consideration.** A stockholder of a corporation, as part of a transaction whereby he sold for the corporation a number of shares of its "treasury stock," wrote a letter to the purchaser, in which, after reciting the terms of the sale, he stated that, in consideration of the buyer's "having purchased the shares at his request and on his recommendation, he would, when requested by the buyer, at any time within ninety days," after a designated date, purchase the stock from the buyer at the price paid by him. He also requested the buyer to remit the purchase price to him, which was done, and, pursuant to an arrangement with the general manager of the corporation, he retained one-half thereof to apply on an indebtedness owing to him by the corporation. *Held*, that the contract to purchase the stock from the buyer was supported by a consideration and was enforceable; the words, "having purchased," not indicating a past consideration, in view of the fact that the letter was part of the transaction. *Klein v. Johnson*, 453.
10. **Consideration.** Where there is no present consideration for a contract, it is a mere *nudum pactum* and unenforceable. *Moore v. McHaney*, 686.

CONVERSION. See *Banks*, 3.

CONVEYANCES. See Corporations, 1; Covenants; Fraudulent Conveyances; Mortgages and Deeds of Trust; Statute of Frauds, 1.

1. **Contradiction by Parol Evidence: Waiver of Objection.** Although parol evidence contradicting the covenants of a deed of conveyance is not admissible, if objection is made, nevertheless where such evidence is admitted without objection, the objection is waived and a finding may be predicated on the evidence. *Stone v. Fry*, 607.
2. **Contradicting Recitals: Parol Evidence.** In an action for the value of timber cut and removed by defendant from plaintiff's land, evidence by defendant, that he understood that a quitclaim deed, by which plaintiff quitclaimed the standing timber to him, with the privilege of entry and removal for six years, gave him six years to remove the timber, not from the date of the deed, "but when he got ready," was incompetent. *Hanna v. Buford*, 654.
3. **Quitclaim Deed to Timber: Construction: Time for Removal of Timber.** A deed quitclaiming the standing timber on the land described, with the privilege of entry and removal for six years, passed title to the timber, defeasible as to such of it as was not removed by the grantee within that time, without any reasonable time beyond that time; so that, where the grantee entered and removed timber after such period, he was liable to the seller for its value, and the defense that he entered within a "reasonable time" after the expiration of the six-year period was unavailing. *Ib.*

CORPORATIONS. See Bankruptcy, 1; Executors and Administrators, 7; Principal and Agent, 5.

1. **Contracts for Sale of Real Estate.** The contracts which the Statute of Frauds requires to be in writing, must be in writing, but as the Statute of Frauds does not require contracts within its purview to be under seal the contracts of corporations even for the sale of land do not have to be under seal. *State ex rel. v. Parke-Davis & Co.*, 219.
2. **Contract for Repurchase of Stock Sold: Consideration.** A stockholder of a corporation, as part of a transaction whereby he sold for the corporation a number of shares of its "treasury stock," wrote a letter to the purchaser, in which, after reciting the terms of the sale, he stated that, in consideration of the buyer's "having purchased the shares at his request and on his recommendation, he would, when requested by the buyer, at any time within ninety days," after a designated date, purchase the stock from the buyer at the price paid by him. He also requested the buyer to remit the purchase price to him, which was done, and, pursuant to an arrangement with the general manager of the corporation, he retained one-half thereof to apply on an indebtedness owing to him by the corporation. *Held*, that the contract to purchase the stock from the buyer was supported by a consideration and was enforceable; the words, "having purchased," not indicating a past consideration, in view of the fact that the letter was part of the transaction. *Klein v. Johnson*, 453.

"COST." See Evidence, 6.

COSTS. See *Tender*, 3.

Interest. Court costs, using the term "costs" in its technical sense, do not bear or draw interest. *McManus v. Burrows*, 594.

COURTS. See *Appellate Practice*; *Circuit Courts*; *Equity*, 1; *Justices' Courts*; *Probate Courts*.

COVENANTS.

1. **Action for Breach: Parties: Joinder of Wife.** In an action for the breach of a covenant in a deed, executed by a husband and a wife, conveying the husband's property, the wife is neither a proper nor a necessary party, in view of Sec. 2788, R. S. 1909, and where the petition declares upon a covenant made by the husband, the fact that the wife joined in the deed would not defeat a recovery, on the theory that there was a variance or failure of proof. *Stone v. Fry*, 607.
2. **Same: Statutory Implied Covenants: Pleading.** An allegation in the petition, in an action for the breach of a covenant implied by Sec. 2793, R. S. 1909, in a deed containing the words "grant, bargain and sell," that, in and by such deed, the grantor covenanted and agreed that he would warrant and defend the title to said real estate against taxes assessed against the real estate for a certain year, correctly pleaded the legal effect of the covenant. *Ib.*

CRIMES AND PUNISHMENTS. See *Indictments and Informations*; *Physicians and Surgeons*, 1, 2.

DAMAGES. See *Banks*, 3; *Common Carriers*, 17; *Death by Wrongful Act*, 1, 2; *Injunctions*, 4; *Married Women*, 3; *Principal and Agent*, 1; *Sales*, 9.

1. **Railroads: Injury to Employee: Federal Employers' Liability Act: Measure of Damages.** An instruction on the measure of damages regarding the contributory negligence of plaintiff which states: "Then such damage should be diminished by the jury in proportion to the amount of negligence attributable to him, as compared with the negligence, if any, attributable to the defendant" is erroneous. *Cross v. R. R.*, 202.
2. **Personal Injuries: Instructions: Measure of Damages.** An instruction, which told the jury that in the event they found for plaintiffs they would assess their damages in a sum not less than two thousand and not more than ten thousand in the discretion of the jury taking into consideration all the facts and circumstances in evidence in the case, is not erroneous. And the omission of explanatory features was mere nondirection and not misdirection and is not reversible error, especially when the records clearly show that the appellants were in no way prejudiced thereby. *Baldwin v. Harvey*, 233.
3. **Excessiveness of Recovery: No Proof of Damages.** Where a petition for damages for negligence in driving an automobile against plaintiff's buggy, asks damages, in a lump sum, for the personal injury and injury to the horse and destruction of the buggy and harness; and, on account of failing to prove the value of the horse, buggy and harness, the court directed that no damages could be allowed for those items, yet the jury returned a verdict for the entire sum claimed, it was held that such verdict should be set aside. *Tapscott v. Tyson*, 253.

DAMAGES—Continued.

4. **Recoverable Damages: Fright: Nervousness.** A large mercantile establishment operated elevators to take customers from floor to floor. A woman entered one on the second floor to descend to the street floor. Through negligent defects in the elevator, it failed to stop and ran rapidly to the basement where it struck violently against the elevator shaft. This frightened and terrified the woman and other passengers, and hurt her bodily, as well. Bodily injury further developed, as well as great nervous derangement. It was *held* that, the bodily injury, anguish of mind and nervous derangement, were all elements of damages in her husband's action for loss of services. *McCardle v. Dry Goods Co.*, 263.
5. **Same.** Fright, terror and nervous derangement, accompanied by bodily injury caused by negligence, become elements of damages. And such physical injury may be wholly internal, and it may be caused by a jar or jolt, resulting from the impact of an elevator where it has dropped to the bottom of the shaft. *Ib.*
6. **Same.** If a negligent act causes fright and terror, but not bodily injury, there is no liability, though bodily injury should result from the fright. But if the negligence causes physical injury, and fright, there is liability for both; and, in that case, the injuries, physical and nervous, which are caused and followed by the fright, also are elements of damage. *Ib.*
7. **Personal Injury: Death: Expectancy of Life: Date of Death.** Where a party is injured through negligence of another and dies before judgment, but not from his injury, his administrator is not entitled to recover damages for a period covering his expectancy in life, but only up to his death. *Shoven v. Street Ry.*, 292.
8. **Personal Injuries: Excessiveness of Verdict.** Plaintiff, a man twenty-three years of age, strong and vigorous, was injured in such a way as to necessitate the removal of a bone from the instep of his left foot and the ligaments attached thereto, as a result of which the foot will not only remain weak, but plaintiff will be unable to control it and it will more or less flop as he steps, so that he will be a cripple for life. *Held*, that a verdict for \$5000 was not excessive. *Price v. Bldg. Co.*, 395.
9. **Measure of Damages: Generality of Instructions: Waiver.** Where the instruction on the measure of damages is correct in its general scope, it is the duty of defendant, if he deems the instruction too general, to request that a limiting instruction be given. *O'Malley v. Musick*, 405.
10. **Same.** An instruction on the measure of damages, in an action for personal injuries, is not to be condemned on the ground that it is not specific, where it is correct in its general scope; especially where instructions given for defendant supply everything that is necessary and accurately declare the law on that subject. *O'Brien v. Adding Mach. Co.*, 501.
11. **Personal Injury: Punitive Damages.** In an action for personal injuries negligently inflicted, the law will confine the recovery to compensatory damages, and will not allow those that are punitive in their nature. *Thomure v. Railroad*, 640.

DAMAGES—Continued.

12. **Same: Excessiveness of Recovery.** Plaintiff, a woman fifty years of age, had both bones of one of her legs broken below the knee. The evidence tended to show that, although the injury would not be permanent, it would trouble her for a long time, and that she would not be able to walk without crutches for a long time. *Held*, that a verdict for \$3500 was not excessive. *Thomure v. Railroad*, 640.

DEATH BY WRONGFUL ACT. See Physicians and Surgeons.

1. **Action by Parent: Damages.** In an action by parents for the wrongful death of their child, loss of society of the deceased child is not an element of damages. *O'Brien v. Heman*, 477.
2. **Same: Excessiveness of Verdict.** A verdict for \$4100, in favor of parents for the death of a twelve-year-old boy, who was bright and intelligent, and, although attending school, assisted his father some at his trade, was not excessive. *Ib.*

DEEDS. See Conveyances.**DEFINITIONS. See Common Carriers, 9; Evidence, 6; Wills, 2.****DIVORCE.**

1. **Custody of Children: Jurisdiction.** by reason of the separation and divorce of parents, their child becomes a ward of the court in which the decree of divorce is rendered, and jurisdiction to award the custody of such child vests in that court to the exclusion of all others. Such jurisdiction is a continuing one, giving the court power to modify its decree as to the custody of the child from time to time, as circumstances change and new conditions arise to make a modification necessary. *Meredith v. Krauthoff*, 149.
2. **Same: Rights of Parents.** The Act of 1913, Laws of Mo. 1913, page 91, in relation to the custody of children did not create a new rule or principle upon which cases involving the custody of children are to be decided, but merely placed the mother upon the same legal level with the father in respect of her eligibility to be selected as the custodian of her child. The right of neither parent is absolute, nor can it become so by contract or agreement. The custody of a child is in the nature of a trust and is upheld only so long as the duties of that trust are faithfully carried out. *Ib.*
3. **Same: Contracts Relating to Custody.** Parties cannot make a final and absolutely irrevocable contract concerning the custody of their child save in the method pointed out by apprenticeships and deeds of adoption. Nor can the court which renders a decree of divorce make a final and absolute decree as to the custody of the child. It is subject to modification as new circumstances arise from time to time. *Ib.*
4. **Same: Guiding Principles.** In determining who shall have the custody of a child the supreme consideration to be ever kept in mind is the child's welfare. The rights of neither parent should be disregarded, but the welfare of the child is superior to the claims of either parent; even the wishes of the child itself must yield to that. *Ib.*

DIVORCE—Continued.

5. **Same: Evidence.** In cases involving the custody of children, the evidence takes a wide range. No other occasion can call more loudly for judicial vigilance in reaching for the exact truth. The attitude of the parents toward each other, the causes leading to the divorce, their treatment of each other, and the character of the parties are all material and admissible in evidence as bearing upon the question of the fitness of the respective parents to have the custody of their child. This should be considered solely in order to arrive at what is for the good of the child, and not in any way for the purpose of gratifying the wishes of one parent or the other, or with any idea of punishment or of rewarding either parent. *Ib.*
6. **Same: Facts Justifying a Change of Custody: Influencing Child Against Parent.** Any act on the part of one parent which tends, or will tend, to cause the child to lose respect for the other parent or prejudice the mind of the child against its parent is an abuse of the trust. And where the evidence shows that the influences surrounding a child were such as to lead him to believe without cause that his father was not to be trusted; that he was not respected and had no standing in the community; that the father did not provide for him; that his father's family and relations were undesirable people all of which was without foundation; and that the child was led to imbibe unwholesome views of life; this will be deemed sufficient grounds for changing the custody of the child. *Ib.*
7. **Same.** The facts in this case considered and analyzed, it is held that, taking the whole cycle of the boy's career into consideration, and that he is now twelve-and-a-half years of age and about to enter upon one of the most critical periods of life and needs a father's advice and direction, and that at this age boys begin to escape their mother's apron strings and the influence and training of his father and the benefits of his father's society are what is best for him now, the custody of the boy should be, and is awarded to the father under certain conditions. *Ib.*
8. **Pleading: Vagrancy.** In an action for divorce, where the plaintiff pleads vagrancy and other indignities, it is not necessary to plead the exact language of the statute. And when the evidence shows that the defendant is clearly a vagrant within the meaning of the statute she is entitled to divorce. *Marolf v. Marolf*, 239.
9. **Jurisdiction: Appellate Practice.** The plaintiff sued for divorce alleging that the offense or injury complained of was committed within this State and while both of the parties resided in this State. The defendant failed to appear, and the court heard the evidence and dismissed the suit for lack of jurisdiction. *Held*, that matters of exception cannot be reviewed in the appellate court unless they are preserved in a motion for new trial, filed in proper time and the filing and overruling of the motion must appear in the abstract of that part of the record called the record proper to distinguish it from the bill of exceptions. *Clark v. Clark*, 278.
10. **Same: Petition.** It is not necessary to allege in a petition for divorce that the plaintiff resided within the State one whole year next before the filing of the petition, if it is alleged that the offense or injury complained of was committed within the State or while one or both parties resided within this State. *Ib.*

DOMESTIC RELATIONS. See Divorce; Equity, 1; Husband and Wife; Injunctions, 3; Married Women; Parent and Child.

DOWER.

Dower in Personalty: Distribution. The phrase "dower in personal estate" occurring in section 117, Revised Statutes of Missouri 1909, refers to the widow's share in the personalty of her deceased husband, equal to the share of a child of such husband, given by section 349. So that when an intestate died leaving a widow and one child, and the widow had taken \$400 worth of property at its appraised value under section 316, on this distribution between the widow and the child, said \$400 should be deducted from the share going to the widow under said section 349. *Finnell Estate v. Howard*, 214.

EQUITY. See Injunctions; Principal and Agent, 3.

Married Women: Equitable Jurisdiction: Effect of Enactment of Married Women's Act. The power of courts of equity to protect the separate estate of the wife against the marital rights of her husband and the claims of his creditors was not restricted by the enactment of the Married Women's Acts, the design of which is to enlarge, and not restrain, the remedies of *femmes covert*. *Mathias v. Arnold*, 352.

ESTOPPEL. See Municipal Corporations, 11; Principal and Agent, 3.

1. **Mechanics' Liens: Agency of Husband: Estoppel to Deny Agency.** A husband entered into a contract for the erection of a house on his wife's lot. The husband and wife lived at premises adjoining the lot on which the house was erected, and the wife was on the lot many times while the house was being erected, and knew that it was intended for their home. The husband borrowed money to erect the house, to secure which the wife and husband pledged a deed of trust on the property, executed by them; the wife knowing that the proceeds of the loan were to be used in completing the house. The wife did not authorize the husband to build the house, and told him that she objected to his doing so, but did not make her objection known to anyone else. In an action to enforce a mechanic's lien against the house and lot, for material used in constructing the house, and not paid for, *held* that the wife was estopped, as a matter of law, from denying the agency of her husband, and hence her property was subject to the mechanic's lien. *Boeckeler Lumber Co. v. Wahlbrink*, 334.
2. **Same: Estoppel of Lienors by Silence.** In an action to enforce a mechanic's lien for material used in the construction of a building, it appeared that an officer of plaintiff corporation, when asked by the owner whether the contractor owed it any money for material furnished for the building, answered that the contractor owed it some money, he thought, but that he did not know whether or not it was on the building in question, and that he would look the matter up and let the owner know. The owner then told plaintiff's officer that he was going to settle with the contractor "by a certain date," and would deduct whatever was owing plaintiff, if anything, for material that had not been paid for. About ten days thereafter, not having heard from plaintiff, he settled with the contractor; but whether or not that was within or after the date specified in the conversation with plaintiff's officer was not shown. *Held*, that the court

ESTOPPEL—Continued.

should have instructed that, as a matter of law, plaintiff was not estopped from maintaining the action, on the theory that it was silent when it was under duty to speak, since plaintiff was not misled to his prejudice into the belief that the contractor was not indebted to plaintiff for material furnished for the building.

Held, by NORTON, J., dissenting, that whether plaintiff was estopped by silence, was a question for the jury. *Ib.*

EVIDENCE. See Appellate Practice, 3, 6, 20; Carriers of Passengers, 2, 7; Divorce, 5; Fraud and Deceit, 4; Master and Servant, 8; Municipal Corporations, 5, 11, 13; Parent and Child, 5; Physicians and Surgeons, 3; Presumptions; Sales, 5, 10, 12; Tender, 1; Witnesses.

1. **Photographs: Sketches.** In an action for the death of an employee from moving shafting in a mill, which was destroyed by fire after the injury, a sketch made from a photograph of the interior of the mill, showing the position of the shafting and the immediate surroundings, which was identified by witnesses as a fairly accurate representation, and was used merely to illustrate their descriptions, and not as independent evidence, was properly admitted in evidence, notwithstanding the fact that the photograph was neither produced nor accounted for. *Daniels v. Goeke*, 1.
2. **Customs and Usages: Rejection of Evidence.** In an action for the purchase price of perishable goods which the buyer refused to accept, defendant set up as a defense that, inasmuch as the contract was silent concerning the place of delivery, delivery should have been made at the seller's place of business, and was not made there, but was attempted to be made elsewhere. Plaintiff asked a witness if he was "familiar with the custom of the trade as to where goods are shipped from by the general produce man, when he makes an order from his central place of business, as to whether it is the custom to ship all the goods from the central place of business or whether he ships from other places." The court, in sustaining an objection to the question, remarked that "there might be a state of facts that would justify the conclusion that a person is bound by custom, but such a state of facts had not been shown." Plaintiff offered no further testimony to meet the suggestion of the court. *Held*, that the court did not err in sustaining the objection. *Grocery Co. v. Pillman*, 15.
3. **Written Contracts: Contradiction by Parol Evidence.** Where a sale is made by written contract this does not preclude defendants from showing that its execution was procured by fraud. And testimony of such fraud does not vary the terms of such a written contract. *Richardson Mach. Co. v. Nelson*, 230.
4. **Impeachment of Witness: Deposition in Former Trial.** When a witness is confronted with his deposition, or a bill of exceptions in a former trial, for the purpose of contradicting his present testimony, he is entitled to see the whole of his testimony, on the subject in hand; and, unless the whole is introduced, it is error for opposing counsel to select special parts with which to contradict him. *Showen v. Street Ry.*, 292.
5. **Presumption: Knowledge of Fact.** A party litigant who is in possession of knowledge of the fact whether a debt from a

EVIDENCE—Continued.

third party is still owing him, must show the fact. He cannot be permitted to show that two and a half years prior to the trial the debt was owing to him and invoke a presumption that the debt still is owing at time of the trial. *Fifth-third National Bank v. McCrory*, 295.

6. **Opinion Evidence: "Value:" "Cost."** The value of an article is regarded as the market value—that is, the price it would command in the open market—and is frequently, in the event there is no ready market, a matter of opinion; whereas the cost of an article is the amount which one has paid out for it, and about which he is fully advised and may make a positive statement of fact. *Farber v. Ins. Co.*, 307.
7. **Explanation of Consideration Clause: Parol Evidence.** The consideration clause of an assignment of a contract, reciting that, "for value received," the contract was assigned, was not contractual in its nature, and hence was open to explanation by parol, so that the assignee, who, by the terms of the assignment, assumed the obligations of the assignor under the contract, had the right to maintain an action to recover an amount which he claimed the assignor agreed to pay him as consideration for the assignment. *Heagy v. Cox*, 377.
8. **Burden of Proof: Evidence Evenly Balanced.** Where the evidence is evenly balanced, the party upon whom the burden of proof rests has failed to sustain his burden, and the adverse party is entitled to a verdict. *Sparkman v. R. R.*, 463.
9. **Rejection: Cumulative Evidence.** It is not error to reject evidence, where the fact it tends to prove is otherwise established and the adverse party admits it to be true. *Krallman v. Potashnick*, 516.
10. **Conveyances: Contradiction by Parol Evidence: Waiver of Objection.** Although parol evidence contradicting the covenants of a deed of conveyance is not admissible, if objection is made, nevertheless where such evidence is admitted without objection, the objection is waived and a finding may be predicated on the evidence. *Stone v. Fry*, 607.
11. **Statement Prepared by Witness: Admissibility.** A written statement, prepared by defendant's claim agent, setting forth plaintiff's version of the matter in controversy, as detailed by her to the claim agent, but which was not signed by her, was properly excluded from evidence; the claim agent having testified concerning what plaintiff told him. *Thomure v. R. R.*, 640.
12. **Conveyances: Contradicting Recitals: Parol Evidence.** In an action for the value of timber cut and removed by defendant from plaintiff's land, evidence by defendant, that he understood that a quitclaim deed, by which plaintiff quitclaimed the standing timber to him, with the privilege of entry and removal for six years, gave him six years to remove the timber, not from the date of the deed, "but when he got ready," was incompetent. *Hanna v. Buford*, 654.

EXECUTIONS.

1. **Alias and Pluries Writs.** The right to alias and pluries writs of execution has always been recognized in this State, notwithstanding there is no statute granting it. *McManus v. Burrows*, 594.

EXECUTIONS—Continued.

2. **Partition: Allowances to Commissioners: Right to Execution.** The fact that attorneys in a partition suit obtained an execution for their services against one of the parties adjudged to pay the same and that the execution was returned satisfied, did not affect the right of a commissioner to obtain an execution for the balance due on the amount awarded him as compensation for his services, against another of the parties, who was adjudged to pay the same. *Ib.*

EXECUTORS AND ADMINISTRATORS. See Bills and Notes, 1; Witnesses, 6.

1. **Failure to Account for Assets: Liability of Sureties.** An administrator who takes property into his hands under color of his office, and fails to account for it, his surety is bound therefor even if, as a matter of fact, it was not in reality assets of the estate. *State ex rel. v. Surety Co., 191.*
2. **Same: Irregular Appointment.** The improper appointment of an administrator *de bonis non* does not affect the liability of his sureties, if the administrator acts under the appointment; and, even if the letters of administration are void, the bond is good as a common-law bond. *Ib.*
3. **Same: Illegal Sales.** Where an administrator purchases property at his own sale and at one-half of the appraised value, the same is void and as if it had never been. *Ib.*
4. **Final Settlement.** In passing on the final settlement of an estate the probate court has power to go into all past accounts and settlements and correct any errors or invalidities anywhere throughout the administration. *Ib.*
5. **Dower in Personality: Distribution.** The phrase "dower in personal estate" occurring in section 117, Revised Statutes of Missouri 1909, refers to the widow's share in the personality of her deceased husband, equal to the share of a child of such husband, given by section 349. So that when an intestate died leaving a widow and one child, and the widow had taken \$400 worth of property at its appraised value under section 316, on this distribution between the widow and the child, said \$400 should be deducted from the share going to the widow under said section 349. *Finnell Estate v. Howard, 214.*
6. **Contracts: Claim for Services Rendered.** When parties enter into the employment of a person and accept money, etc., as their compensation, without complaint, they cannot after his death maintain a valid claim against his estate for services over and above what they were paid, especially where they not only fail to prove a contract of employment, but also utterly fail to prove any indebtedness from their employer to them under the terms of that contract. *Stewart v. Estate of Turner, 272.*
7. **Contract for Repurchase of Corporate Stock: Right to Enforce.** A valid contract to repurchase corporate stock on the request of the purchaser, if such request was made within a certain time, was not personal to the purchaser, so that, upon his decease, the promisor was bound to purchase, if requested so to do by the promisee's personal representative within the time stipulated. *Klein v. Johnson, 453.*

FEDERAL EMPLOYERS' LIABILITY ACT. See Damages, 1; Master and Servant, 20; Railroads, 1.

FIRE INSURANCE.

1. **Total Loss: Amount of Recovery.** The plaintiff sued to recover from the defendant \$1500, as the three-fourths value of the face of a fire insurance policy on her furniture worth something over \$2000, which was totally destroyed by fire. The adjuster agreed to pay her \$1266.67, and she agreed to take it provided it was paid immediately. The adjuster then discovered the three-fourths clause in the policy and told her after she made up proof for \$1266.67, that they could only pay her \$950. This she refused to accept. *Held*, that since the evidence was conflicting it was for the jury to determine and their verdict is final. *Sailors v. Insurance Co.*, 199.
2. **Removal of Property: Liability of Company: Knowledge of Agent.** Where an agent for a fire insurance company issues a policy on household furniture stating it to be a certain house when he knows it is not in that house, but is to be, and is immediately moved into it, the policy is valid and the company is liable for its destruction in its new location. *Weston v. Insurance Co.*, 282.
3. **Same: Valued Policy.** Where household furniture is to be removed to a new location, but before removal an insurance company issues a policy describing it as in the new location, and, after removal the goods burn, the company is liable and the policy is a valued policy, under the statute, as in any other instance. *Ib.*
4. **Vexatious Delay: Penalty.** Where a fire insurance company vexatiously refuses to pay an honest and legal claim of loss, the statute authorizes a jury to assess a penalty of ten per cent and plaintiff's attorneys' fees against the company. But in determining whether the refusal was vexatious, the matter must be viewed as it appeared when the refusal was made. If, at that time, there was enough to excite a suspicion against the integrity of the loss, in the mind of a prudent and honest man in good faith endeavoring to ascertain the facts, there is no ground upon which to base a verdict for a penalty. *Ib.*
5. **Same: Jury Question.** The question whether there has been a vexatious refusal of an insurance company to pay a loss is for the jury, but a verdict for the penalty will not be allowed to stand, where the company had good reason to believe that a fraud or false claim is being made. *Ib.*
6. **Valued Policy Law: Effect of Misrepresentation Concerning Value of Property.** Sec. 7030, R. S. 1909, providing that no insurance company shall take a risk on any property at a ratio greater than three-fourths of its value, and, "when taken," its value shall not be questioned in any proceeding, applies to insurance on personal and real property, and is a part of every policy of fire insurance, and estops insurer, issuing a valid policy, from disputing the value of the property at the time of issuance of the policy, but fraudulent representations of fact, designedly made by insured, relative to the value of property, as an inducement to the contract of insurance fixing the valuation, if believed and acted on by insurer, so as to cause it to issue a policy in excess of the true value of the property at the time, will render the policy void from its inception, and the fraudulent representations may be shown in defense; the words "when taken" implying that the negotiations antecedent to the policy shall be honest and fair as to material matters, to the end that a valid contract as to value may be had.

FIRE INSURANCE—Continued.

Held, by REYNOLDS, P. J., in a separate opinion, that the question of the value of the property destroyed is not open to inquiry, and that a false representation concerning its cost is not such a fraud as will avoid the policy, in view of the Valued Policy Law (Sec. 7030, R. S. 1909). *Farber v. Ins. Co.*, 307.

7. **Misrepresentation Concerning Cost of Property: Question for Jury.** In an action on a policy insuring the owner of an automobile against loss by fire, *held*, under the evidence, that whether plaintiff, in procuring the insurance, made a false representation concerning the cost of the automobile was a question for the jury. *Ib.*
8. **Same: "Cost:" "Value."** A statement of the actual cost of an article is one of fact, while a statement concerning its value savors more or less of opinion, and, therefore, the overvaluation of property insured must be grossly enormous to admit of any dispute, and a statement of value, if honestly made, will not vitiate the policy. *Ib.*
9. **Misrepresentations: Breach of Warranty: "Fact Material to Risk:" Statute.** Sec. 7025, R. S. 1909, providing that the warranty of any fact incorporated in a fire insurance policy, purporting to be assented to by insured, which shall not materially affect the risk, shall be taken as a representation only, does not impair the effect of a warranty pertaining to a fact material to the risk insured against, unless otherwise concluded by some other statute; a "fact material to the risk" in the law of insurance being one which, if communicated to the agent, would induce him either to decline the insurance altogether, or not accept it unless a higher premium is paid. *Ib.*
10. **Same: Breach of Warranty: Effect of Valued Policy Law.** While a representation that an automobile, insured against fire in the amount of \$1750, cost insured \$2000, whereas, in fact, it cost only \$1427, was material to the risk insured against, within Sec. 7025, R. S. 1909, providing that the warranty of any fact in a fire insurance policy not materially affecting the risk shall be deemed a representation only, and was a warranty under a policy stipulating that insured warrants statements made by him to be true, nevertheless, under Sec. 7030, R. S. 1909, which provides that no insurance company shall take a risk on any property at a ratio greater than three-fourths of its value, and, when taken, its value shall not be questioned in any proceeding, the misrepresentation would not defeat a recovery on the policy, on the theory that insured breached a warranty concerning a matter material to the risk, since it is the duty of insurer, under Sec. 7030, to determine the value of the property insured and the amount of insurance to be written thereon, and it is estopped from disputing the value thus fixed, where such value is fixed through a valid contract, free from fraud and deceit in its inception.

Held, by ALLEN, J., in a separate opinion, that the misrepresentation was available as a defense, on the theory that insured breached a warranty concerning a matter material to the risk, since, while Sec. 7030 does not permit insurer to dispute the value of the property at the time of the issuance of the policy, in order to reduce the amount of recovery, nevertheless that section does not render nugatory a warranty otherwise material to the risk merely because it is utilized as a factor in estimating value. *Ib.*

FIRE INSURANCE—Continued.

11. **Action on Policy: Defenses: Fraud and Deceit: Sufficiency of Evidence.** In an action to recover the amount of a draft drawn by defendant fire insurance company, payable to insured, and by him indorsed and delivered to plaintiff, in payment of a claim under a fire insurance policy issued by defendant, which draft defendant thereafter declined to pay, defended on the ground that plaintiff and others had conspired together for the purpose of acquiring properties with the view of procuring fire insurance thereon, grossly in excess of the value thereof, causing the same to be destroyed by fire, and collecting insurance thereon, and that, pursuant to such conspiracy, plaintiff and others acquired the property described in the policy issued by defendant, procured fire insurance thereon, including the policy issued by defendant, grossly in excess of the value of the property, and caused the same to be destroyed by fire, evidence *held* sufficient to warrant the submission of this defense to the jury. *Copeland v. Ins. Co.*, 435.

FRATERNAL BENEFICIARY ASSOCIATIONS. See Life Insurance, 19; Tender, 6.

1. **Change of By-Laws: Effect on Prior Certificates.** Where a death benefit certificate issued by a fraternal beneficiary association provided for payment of the benefit if the member had complied with, and that the rights of the beneficiary should be governed by, the laws of the order then in force or *thereafter adopted*, a by-law subsequently adopted, which declared that no benefit should be paid on the death of a member committing suicide, but that the beneficiary should receive twice the amount contributed to the life benefit fund by the member, precluded a recovery for the death of a member who committed suicide, although he had been a member for more than five years, and the by-laws in force when the certificate was issued provided for payment of the benefit, in case a member committed suicide five years or more after the date of the certificate. [*NORTONI, J.*, dissents.] *Dessauer v. Maccabees*, 76.
2. **Not Licensed to do Business When Policy Issues: Suicide as Defense: Statutes.** A provision in a policy issued to a citizen of this State by a fraternal beneficiary association organized under the laws of another State, that suicide shall be an absolute bar to any recovery thereon by his beneficiaries, will not defeat a recovery, where the company was not licensed to do business in this State at the time the policy was issued but was so licensed when the insured committed suicide; for, under such circumstances, the policy is governed by Sec. 6945, R. S. 1909, which provides that suicide shall be no defense, unless it be shown that insured contemplated suicide at the time he made his application for the policy, since Sec. 6962, exempting fraternal beneficiary associations from the provisions of the general statute (Sec. 6945) applies to such associations only as were "doing business in this State" at the time the policy was issued—that is, were licensed to do business in the State as the act authorizes and requires; following *Schmidt v. Foresters*, 228 Mo. 675. *Schmidt v. United Order of Foresters*, 415.
3. **Misrepresentations: Statutes.** Sections 6937 and 6936, R. S. 1909, which provide that no misrepresentation made in obtaining a life insurance policy shall be deemed material or render the policy void, unless the matter misrepresented actually contributes to the death, relate to insurance contracts entered into

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued.

on the stipulated premium plan only, and the doctrine of warranty, which, prior to the enactment of these statutes, applied to insurance contracts of all kinds, still applies to insurance on the assessment plan, or fraternal in character, and, in either case, the law exacts literal compliance with the warranty, rather than mere substantial compliance, which suffices in the case of representations. *Kribs v. Foresters*, 524.

4. **Character of Insurance: Method of Determining.** Whether a life insurance contract provides for insurance on the assessment plan or evidences a contract which is subject to the laws relating to fraternal beneficiary associations depends, not on the nature of the order issuing the contract, but on the terms and character of the contract, although the order was licensed to conduct business as a fraternal beneficiary association prior to the issuance of the contract. *Ib.*
5. **Same: Facts Stated.** The by-laws of a fraternal insurance order, possessing a representative form of government, a lodge system and ritualistic work, and conducting an insurance business by levying fixed monthly assessments and dues going into a common fund, declared that members taking term certificates, should pay monthly for each \$1000 benefit the amount shown by a table, and authorized special assessments to pay all claims against the fund, and provided that the beneficiary of each term member should participate in the fund to the extent of the net amount realized from one assessment on all of its term members, not exceeding the amount named in the benefit certificate, but if there is sufficient money in the fund, the executive council may, in its discretion, pay the amount named in the certificate. The order, which was admitted to do business in this State as a fraternal beneficiary association, issued a certificate in this State, binding it to pay, at the death of the member, the net amount realized by the order in its term insurance fund from one assessment on all members, not exceeding a specified sum. *Held*, that the insurance was on the assessment plan under Sec. 6950, R. S. 1909, and that, under Sec. 6952, the beneficiary could recover the face of the policy, instead of the amount of one assessment; section 6962, exempting fraternal beneficiary associations, not being applicable. *Ib.*

FRAUD AND DECEIT. See *Fire Insurance*, 11; *Married Women*, 4; *Statute of Frauds*; *Statute of Limitations*, 1.

1. **Action for Fraud: Sufficiency of Evidence.** In an action for fraud in inducing plaintiff's intestate to exchange her land for nonexistent land, evidence *held* sufficient to support a verdict for plaintiff. *O'Malley v. Musick*, 405.
2. **Same: Instructions: Singling Out Facts.** In an action for fraud in inducing plaintiff's intestate to exchange her land for nonexistent land, by means of a plat, purporting to cover the nonexistent land, *held* that, in view of the fact that defendant's use of such plat was not a mere isolated circumstance in the case, but was the chief evidence to connect defendant with the fraud, an instruction requiring the jury to find that defendant exhibited the plat to the agent of plaintiff's intestate and represented that the land was the land to be exchanged for hers, was not improper as directing the jury's attention to a particular fact in evidence and unduly emphasizing it. *Ib.*

FRAUD AND DECEIT—Continued.

3. **Same: Parties: Real Party in Interest.** In an action for fraud in inducing plaintiff's intestate to exchange her land for non-existent land, the fact that the intestate took the deed covering the nonexistent land in the name of her daughter was no ground for arresting a judgment for plaintiff, on the theory that plaintiff's intestate was not the real party in interest, since the intestate was the one defrauded of the property which she exchanged. *O'Malley v. Musick*, 405.
4. **Establishment: Evidence.** Since the law presumes that men are honest and actuated by correct motives, fraud is never presumed, and evidence which merely raises a suspicion of fraud will not suffice as proof of the existence thereof, but it is entirely legitimate to infer fraud from surrounding facts and circumstances which point directly to its existence. *Copeland v. Ins. Co.*, 435.
5. **Same.** In a civil case, where plaintiff's fraud is set up as a defense, it is not necessary that proof of his guilt be such as would be necessary to convict him of a crime. *Ib.*

FRAUDULENT CONVEYANCES. See Bankruptcy, 1.

1. **Right to Attack Fraudulent Conveyance: Judgment and Attachment Creditors: Pleading.** A general creditor cannot, but a judgment or attachment creditor can, attack a fraudulent conveyance of his debtor's property. But the petition, in an action to set aside such conveyance, which does not allege that such creditor is a judgment or attachment creditor does not state a cause of action. *Commercial State Bank v. Ankrum*, 251.
2. **Same.** Where a receiver is appointed in an action to set aside a conveyance of real estate for fraud and it appears that no cause of action is stated in the petition, the order appointing the receiver should be vacated. *Ib.*

GUARANTY. See Action, 1; Contracts, 4; Parties, 1.**HUSBAND AND WIFE. See Damages, 4; Divorce; Equity, 1; Estoppel, 1; Injunctions, 3; Married Women; Mechanics' Liens, 1.**

Covenants: Action for Breach: Joinder of Wife. In an action for the breach of a covenant in a deed, executed by a husband and a wife, conveying the husband's property, the wife is neither a proper nor a necessary party, in view of Sec. 2788, R. S. 1909, and where the petition declares upon a covenant made by the husband, the fact that the wife joined in the deed would not defeat a recovery, on the theory that there was a variance or failure of proof. *Stone v. Fry*, 607.

INDICTMENTS AND INFORMATIONS.

1. **Practicing Medicine Without License: Sufficiency of Information: Joinder of Offenses.** An indictment, which in one count charges a defendant with practicing medicine without a license from the State Board of Health, and, also with failing to record his license in the county of his residence, is not a good indictment, because the latter offense is under section 8314, R. S. 1909, and the former under section 8315, R. S. 1909, and, further, because two or more distinct, separate offenses cannot be charged in the same count of an indictment. *State v. Huxoll*, 304.

INDICTMENTS AND INFORMATIONS—Continued.

2. **Negating Exceptions: Language of Statute.** Where an indictment is not in the language of the statute and does not negative the exceptions therein contained, it comes within the rule that, where an indictment is unnecessarily particular in its negatives, the State is concluded by it, if it fails to specifically negative all exceptions. *Ib.*

INJUNCTIONS.

1. **Enjoining Foreclosure of Deed of Trust: Tender of Amount Due.** Where a beneficiary is proceeding to foreclose his deed of trust on the debtor's property and the latter believing the debt to have been paid brings an injunction to prevent the sale, it is not necessary, as a requisite to his right to bring the action, that he should tender any sum, although the court finds that he still owes a balance. It is sufficient to authorize a judgment granting the injunction if he tenders the amount found by the court and deposits it in court. *Koslosky v. Bloch*, 257.
2. **Same: Costs.** Although it is not necessary to make a tender to one who is proceeding to foreclose a deed of trust, before bringing an injunction against him, to prevent the sale, and although the court finds a balance is due the holder of the deed and the debtor then tenders it and pays it into court and the latter sustains the injunction, yet the holder of the deed of trust is entitled to a judgment for the costs. *Ib.*
3. **Right to Restrain Sale of Wife's Property for Husband's Debt.** Under Sec. 2534, R. S. 1909, in view of Secs. 8308 and 8309, as well as under the general jurisdiction possessed by courts of equity to protect the separate estate of a married woman from the claims of her husband or his creditors, an injunction will lie to restrain the sale of a wife's real property under an execution issued upon a judgment against her husband. *Mathias v. Arnold*, 352.
4. **Same: Pleading: Damages.** A petition for an injunction to restrain the sale of a wife's real property under an execution issued upon a judgment against her husband need not plead the injurious consequences resulting from the execution and sale of the wife's property, with particularity, since prejudice will be presumed from the doing of prohibited acts. *Ib.*
5. **Building Restrictions: Threatened Violation of Municipal Ordinance: Injunctions: Persons Entitled to Sue.** The general rule is, that equity will not interfere to restrain the violation of a municipal ordinance nor to prevent the commission of a crime, at the instance of a citizen who suffers no special or peculiar injury from the doing of the act sought to be restrained, different from that suffered by any other citizen, and will not, at a suit of a city, restrain a threatened violation of an ordinance thereof regulating the erection of buildings for the purpose of affording greater security against loss by fire, nor will a suit in equity lie at the instance of an individual, when brought solely for the enforcement of an ordinance, and not because of any special or peculiar damage to him; but where it appears that the erection of a building, in express violation of a valid municipal ordinance, will work special and peculiar injury of an irreparable nature to the plaintiff, he may maintain a suit in equity to enjoin the erection thereof. *Shelton v. Lentz*, 699.

INJUNCTIONS—Continued.

6. **Same.** In an action by an owner of a frame structure, adjoining a proposed brick veneer building and within fifty feet thereof, and of other wooden structures erected prior to the enactment of an ordinance establishing limits and prohibiting the erection of veneer buildings therein, to enjoin the erection of the proposed building, on the ground that the erection of that kind of building was forbidden by the ordinance, *held* that, in view of the fact that the proposed building would contain more combustible material than would buildings permitted by the ordinance, and would increase the danger of damage by fire to plaintiff's buildings and increase insurance rates thereon, plaintiff suffered peculiar and special damage, entitling him to injunctive relief. *Shelton v. Lentz*, 699.

INSTRUCTIONS. See Appellate Practice, 21; Carriers of Passengers, 4, 5, 6; Common Carriers, 15, 16; Life Insurance, 5, 13, 14, 16, 21; Master and Servant, 19, 23, 29, 33; Negligence, 7, 15; Physicians and Surgeons, 2, 8; Principal and Agent, 9; Sales, 8, 11.

1. **Refusal: Covered by Other Instructions.** It is not error to refuse an instruction which defines a term used in the instructions, where that term is correctly defined in other instructions given. *Schuler v. Life Ins. Co.*, 52.
2. **Credibility of Witnesses.** Where there is a sharp conflict in the testimony of the witnesses as to a material fact, it is proper to give the ordinary instructions as to the credibility of the witnesses, although no witness was impeached by evidence of bad reputation for truth or veracity. *Ib.*
3. **Ignoring Admissions.** It is error to submit, in an instruction, a question, raised in the petition, of negligence in failing to instruct plaintiff in the use of the brake, and of whether or not such negligence was the approximate cause of the injury, when the plaintiff's own evidence demonstrates beyond question that the absence of instructions relating to the use of the brake or clutch could not have been a proximate cause. *Bulson v. Shoe Co.*, 128.
4. **Conflicting Instructions.** The giving of conflicting instructions on a material issue is reversible error. *Boeckeler Lumber Co. v. Wahlbrink*, 334.
5. **Submitting Unnecessary Facts: Harmless Error.** An instruction will not be condemned as reversible error for submitting unnecessary facts, where the facts upon which liability is predicated are correctly submitted and the only effect of submitting the other facts is merely to require the jury to find more than is necessary to warrant a recovery. *Price v. Bldg. Co.*, 395.
6. **Credibility of Witnesses.** While there must be something to afford a reasonable basis therefor, to justify the giving of a cautionary instruction, that if the jury believe that any witness has knowingly sworn falsely to any fact material to the issues, they are at liberty to reject all, or any portion, of his testimony, nevertheless where there is a direct and sharp conflict in the testimony as to the material facts, which cannot reasonably be attributed to mistake, inadvertence or lapse of memory, the giving of such an instruction will not be denounced as an abuse of discretion. *Ib.*
7. **Singling Out Facts.** In an action for fraud in inducing plaintiff's intestate to exchange her land for nonexistent land, by means of a plat, purporting to cover the nonexistent land, *held* that, in view of the fact that defendant's use of such plat was

INSTRUCTIONS—Continued.

not a mere isolated circumstance in the case, but was the chief evidence to connect defendant with the fraud, an instruction requiring the jury to find that defendant exhibited the plat to the agent of plaintiff's intestate and represented that the land was the land to be exchanged for hers, was not improper as directing the jury's attention to a particular fact in evidence and unduly emphasizing it. *O'Malley v. Musick*, 405.

8. **Generality of Instructions: Waiver.** Where the instruction on the measure of damages is correct in its general scope, it is the duty of defendant, if he deems the instruction too general, to request that a limiting instruction be given. *Ib.*
9. **Same.** An instruction on the measure of damages, in an action for personal injuries, is not to be condemned on the ground that it is not specific, where it is correct in its general scope; especially where instructions given for defendant supply everything that is necessary and accurately declare the law on that subject. *O'Brien v. Adding Mach. Co.*, 501.
10. **Repetition.** The repetition of the same proposition of law in a number of instructions is to be condemned, even though the proposition is correctly stated. *Reeves v. Lutz*, 550.
11. **Waiver of Generality.** The generality of an instruction is an error of nondirection, not of misdirection, and should be corrected by instructions requested by the adverse party. *Sontag v. Ude*, 617.
12. **Refusal: Point Covered by Other Instructions.** It is not error to refuse an instruction charging on a point covered by the instructions which are given. *Ib.*
13. **Cure by Other Instructions.** Objectionable features of instructions may be cured by the instructions given on behalf of the objecting party. *Ib.*
14. **Necessity of Being Supported by Evidence.** It is error to submit issues to the jury when there is no evidence to support them. *Thomure v. R. R.*, 640.
15. **Submitting Unnecessary Facts: Appellate Practice: Harmless Error.** In an action on an oral promise to pay the debt of another, an instruction given for plaintiff, which, in addition to requiring the jury to find that the promise was made in consideration of some benefit accruing directly to defendant, also required a finding that plaintiff released the original debtor, is not to be condemned as reversible error on the ground that there was no evidence tending to show that plaintiff released the principal debtor, since it merely required the jury to find more than was essential to plaintiff's recovery. *Moore v. McHaney*, 686.
16. **Omissions: Cure by Other Instructions.** Where an instruction given for the plaintiff, which covers the whole case and authorizes a verdict for him, omits to require facts to be found that are essential to a recovery, the error cannot be cured by another instruction given for him, which is sufficient with respect to the matter omitted. *Humphreys v. R. R.*, 710.

INSURANCE. See *Fire Insurance*; *Fraternal Beneficiary Associations*; *Life Insurance*.

1. **Knowledge of Agent: Effect.** The knowledge of the local agent who negotiates an insurance policy is the knowledge of the com-
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INSURANCE—Continued.

pany, notwithstanding a contrary provision in the application or policy. *Schuler v. Life Ins. Co.*, 52.

2. **Vexatious Refusal to Pay: Attorney's Fee: Sufficiency of Evidence.** In an action on an insurance policy, where, for the purpose of recovering an attorney's fee, under Sec. 7068, R. S. 1909, on account of insurer's vexatious refusal to pay, the attorney for plaintiff testified generally as to the reasonable value of his services, without setting out the services in detail, and defendant did not cross-examine him, defendant would not be heard, on appeal, to complain of an allowance for the amount testified to by the attorney. *Schuler v. Life Ins. Co.*, 52.
3. **Vexatious Delay: Penalty: Good Faith.** Where a fire insurance company vexatiously refuses to pay an honest and legal claim of loss, the statute authorizes a jury to assess a penalty of ten per cent and plaintiff's attorneys fees against the company. But in determining whether the refusal was vexatious, the matter must be viewed as it appeared when the refusal was made. If, at that time, there was enough to excite a suspicion against the integrity of the loss, in the mind of a prudent and honest man in good faith endeavoring to ascertain the facts, there is no ground upon which to base a verdict for a penalty. *Weston v. Ins. Co.*, 282.
4. **Same: Jury Question.** The question whether there has been a vexatious refusal of an insurance company to pay a loss is for the jury, but a verdict for the penalty will not be allowed to stand, where the company had good reason to believe that a fraud or false claim is being made. *Ib.*
5. **"Insurance Brokers:" Agent of Insurer or Insured: Statute.** Sec. 7049, R. S. 1909, declaring that whoever, for compensation, acts in any manner, in negotiating contracts of insurance, for any person other than himself, not being the agent or officer of insurer, shall be deemed an "insurance broker," is a mere general declaration of the law as to the function of an insurance broker, and does not render a broker in every transaction the agent of insured, and, notwithstanding the statute, a broker may become the agent of insurer because of some special condition or circumstance attending the particular case. *Farber v. Ins. Co.*, 307.
6. **Same: Facts Stated.** An insurance broker sought out a buyer of an automobile to procure insurance on it, and presented his card, reciting that he was special agent for a company engaged in the insurance business, which was not the insurance company that subsequently issued the policy. Nothing was said to the effect that he was a broker, or anything other than an insurance agent. Subsequently he returned with a policy, which included insurance against loss by theft and fire and insured refused to accept it, because he wanted fire insurance only. Thereafter he delivered a policy insuring against loss by fire, upon which, after it had been delivered to him by insurer, he stamped his name and a recital that he was "special agent" of insurer. The broker was intrusted by insurer with the underwriting of the policy and was also authorized to deliver the policy and collect the premium and to retain a commission out of the premium as his compensation. In an action on the policy, *held* that the broker was not the agent of insured, but of insurer, and hence insured was not bound by false representations made by the broker to insurer to procure the policy, and this is true notwithstanding the false statement appeared in the policy. *Ib.*

INSURANCE—Continued.

7. **Same.** A mere insurance broker who is intrusted by insurer with the delivery of a policy and the collection of a premium is the agent of insurer for such purpose, for an insurance broker, as such, has no authority to receive a premium from an applicant for insurance. *Ib.*
8. **Same.** Where an insurance broker procured a fire insurance policy on an automobile which cost insured \$1427, and indorsed on the policy a statement that the cost was \$2000, and the broker was the agent of insurer in the transaction, insurer was estopped from contradicting the indorsement, although insured accepted and retained the policy. *Ib.*
9. **Forfeiture: Waiver.** The law does not favor forfeitures, and where there is substantial evidence of facts from which it may be found that an insurer has waived a forfeiture clause in a policy issued by it, the matter is for the jury, under appropriate instructions. *Jaggi v. Ins. Co.*, 384.
10. **Damages for Vexatious Refusal to Pay: Question for a Jury.** The question of whether an insurer is chargeable with vexatious delay in refusing to pay a loss, rendering it liable, under Sec. 7068, R. S. 1909, for damages and an attorneys' fee, is for the jury only when, from a general survey of all the facts and circumstances of the case, an inference can be drawn that the refusal was unjustifiable and vexatious. *Ib.*
11. **Same: Sufficiency of Evidence.** In an action on a life insurance policy, defendant on the ground that the policy had lapsed prior to the death of the insured by reason of nonpayment of premiums, evidence that the beneficiary had paid premiums, but without furnishing insurer evidence of the insurability of insured as required by the policy, and that insurer retained the premiums, thereby waiving the forfeiture, that formal demand for payment, with proof of death, was made on insurer, but payment was not made, was sufficient to warrant a finding that insurer had vexatiously refused to pay, justifying the allowance of an attorney's fee for plaintiff, under Sec. 7068, R. S. 1909. *Ib.*

INTEREST. See *Common Carriers*, 17; *Pleading*, 3, 4; *Trial Practice*, 8; *Verdicts*, 2; *Wills*, 4, 5.

1. **Costs: Interest.** Court costs, using the term "costs" in its technical sense, do not bear or draw interest. *McManus v. Burrows*, 594.
2. **Partition: Allowances to Commissioners: Interest.** Allowances to commissioners in a partition suit, for their services, are within Sec. 7181, R. S. 1909, which provides that interest shall be allowed on money due on any judgment from the day of rendering the same until payment, and such allowances draw interest until paid, although the judgment making the allowances does not state expressly that they shall bear interest. *Ib.*

INTERPLEADER.

Sale of Property in Dispute: Right to Appoint Commissioner. A person who had possession of certain bonds but disclaimed ownership tendered the bonds into the circuit court and filed a petition, setting up that the bonds were claimed by different

INTERPLEADER—Continued.

parties, and praying that such parties be required to interplead. The claimants interpleaded, each setting up that he was owner of the bonds. Pending a determination of their claims, the court appointed a commissioner to sell the bonds and pay the proceeds into court to await the determination of ownership. The bonds were sold at the commissioner's sale to defendant, purporting to act as agent for a third person. The third person repudiated the agency, and the commissioner brought suit against defendant for the amount of his bid, less an amount which defendant had paid. *Held*, that, in view of the fact that the case was within the jurisdiction of the court, the parties were before it, the fund was in its custody, and the point decided was within the issues before the court, the point made by defendant, on appeal, that the court did not have jurisdiction to make the order appointing the commissioner and for the sale of the bonds, was untenable. *Griswold v. Haas*, 97.

JUDGMENTS. See *Partition*, 1, 2; *Res Adjudicata*.

Vacation of Judgment: Power of Court. Judgments remain in the breast of the court during the entire term at which they are rendered and may be set aside or vacated at any time during the term upon its own motion. *Paine v. O'Donnell*, 300.

JUSTICES' COURTS.

1. **Appeal to Circuit Court: Questioning Plaintiff's Capacity to Sue.** On appeal to the circuit court from a justice's court, defendant does not, by failing to demur, waive the right to question plaintiff's capacity to sue. *Jaggi v. Ins. Co.*, 384.
2. **Pleading: Effect of Appearance.** The appearance of the defendant in a justice's court raises the general issue. *Ib.*
3. **Pleading: Requisites of Statement.** A statement of a cause of action filed in a justice's court, which advises defendant of the nature of the claim and is specific enough to bar another action on the same demand, is sufficient. *Moore v. McHaney*, 686.

LANDLORD AND TENANT.

1. **Injuries to Pedestrian: Nuisance Adjacent to Alley: Liability of Owner and Tenant.** Where the owner of abutting property constructs and maintains a nuisance adjacent to the highway, and lets the property in this condition, and the tenant continues to maintain or suffer the nuisance as before, both the landlord and the tenant are liable for injuries befalling one passing along the highway as a result of such nuisance. *O'Brien v. Heman*, 477.
2. **Same.** Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, the owners and the tenant were both liable for the death of a traveler in the alley, who fell into the quarry through the chute. *Ib.*

LAWS. See *Life Insurance*, 6, 7.

Rights not Predicable on Disobedience. One who fails to obey the law cannot base any right on such disobedience. *Schuler v. Life Ins. Co.*, 52.

LIENS. See *Mechanics' Liens*.

LIFE INSURANCE. See *Appellate Practice*, 6; *Fraternal Beneficiary Associations*.

1. **Sufficiency of Proof of Death: Circumstantial Evidence.** In an action on a life insurance policy, where there was evidence tending to show that, at a certain time and place, insured was shot and killed, although his body was never seen or identified by any one who was acquainted with him, it was not necessary to a recovery that plaintiff prove that efforts were made to locate insured, as would be required if the unexplained disappearance of insured for the statutory period were relied on as proof of death. *Pfeifer v. Supreme Tribe*, 38.
2. **Same.** In an action on a life insurance policy, evidence held sufficient to warrant the jury in finding that insured was killed at a certain place and time, although his body was never seen or recognized by any one thereafter. *Ib.*
3. **Same: Evidence.** In an action on a life insurance policy, where the evidence as to the death of insured is circumstantial, evidence of the character and habits of insured and of his affection for his family is admissible as tending to show lack of motive for desertion. *Ib.*
4. **Same: Circumstantial Evidence.** In an action on a life insurance policy, where the evidence of the death of insured is circumstantial, the fact that the body was never seen or identified by any one who was acquainted with insured does not preclude the jury from drawing an inference of death from such evidence. *Ib.*
5. **Same: Instructions.** The evidence, in an action on a life insurance policy, was sufficient to warrant a finding that insured died as a result of a gunshot wound inflicted on the date specified in the petition. His body was never seen or identified by anyone who was acquainted with him. At the instance of plaintiff, the court charged the jury that, in order to entitle plaintiff to recover, she must prove to the satisfaction of the jury, by a preponderance, or greater weight, of the evidence, that insured died on or about the date specified in the petition, "but the fact or time of his death may be established by circumstances, in the absence of direct and positive evidence," and that there was no evidence of any person who saw and identified the body of insured after such date, and, therefore, in determining whether he died on or about such date the jury should take into consideration the particular circumstances of his disappearance, his character, habits, relations and conduct with and toward his family at home, and, from all such facts and circumstances in evidence, if they believe that his absence from his home and family for any cause other than his death was improbable, their verdict and finding on the issue of his death should be in favor of plaintiff. *Held*, that the instructions correctly declared the law. *Ib.*
6. **Laws Governing.** A life insurance policy issued by a foreign corporation, which is negotiated in this State, with a resident

LIFE INSURANCE—Continued.

and citizen of this State, is delivered here, and the premiums on which are collected here, is a Missouri contract and subject to its laws. *Schuler v. Life Ins. Co.*, 52.

7. **Same: Erroneous Admission of Evidence: Harmless Error: Appellate Practice.** In an action on a life insurance policy issued by a foreign corporation, but which, by reason of having been issued in this State to a citizen of this State, etc., was subject to the laws of this State, it was error to admit in evidence a law of the State in which the company was organized, which required the policy to contain the entire contract between the parties and provided that nothing, should be incorporated therein by reference to any application or other writing not indorsed upon or attached to the policy when issued; but such error was not prejudicial to the company, since the effect of that law is the same as Sec. 6978, R. S. 1909, requiring insurance companies to attach to every policy and to indorse thereon the substance of the application on which such policy was issued and which is made a part of the contract of insurance, or referred to therein, or which may in any manner affect the validity of the policy. *Ib.*
8. **Failure to Attach Application to Policy: Applicability of Statute to Foreign Corporation.** Sec. 6978, R. S. 1909, requiring insurance companies to attach to every life insurance policy, or endorse thereon, the substance of the application on which it was issued, applies to a company conducting business in this State, although it was organized under the laws of another State. *Ib.*
9. **Same: Effect.** While the failure of a life insurance company to attach to, or endorse on, a policy the substance of the application on which it was issued, as required by Sec. 6978, R. S. 1909, does not invalidate the policy, such failure precludes the company from introducing the application in evidence to support its defense of misrepresentations therein, although the statute fixes no penalty for failure to observe it. *Ib.*
10. **Action on Policy: Conclusiveness of Verdict.** In an action on a life insurance policy, where there was testimony for plaintiff that the answers of insured to the examining physician differed from those written down by the physician, a verdict finding for plaintiff on that evidence is conclusive, on appeal. *Ib.*
11. **Failure to Attach Application to Policy: Effect.** Where, in an action on a life insurance policy, the application for the policy was erroneously admitted in evidence, because not attached to, or endorsed on, the policy, as required by Sec. 6978, R. S. 1909, it was not error to exclude answers propounded to the examining physician based on the application. *Ib.*
12. **Misrepresentation in Application: Reception of Evidence: Discretion of Court.** In an action on a life insurance policy, defended on the ground of misrepresentation in the application, where the examining physician had been allowed to testify generally that the answers of insured to the questions asked him were as written by him in the application, it was within the discretion of the trial court to refuse to permit a separate examination as to each question and answer appearing in the application. *Ib.*
13. **Same: Instructions.** In an action on a life insurance policy defended on the ground of misrepresentation in the application,

LIFE INSURANCE—Continued.

held that it was proper for the court to modify instructions requested by the defendant, directing a verdict for it, under certain hypotheses, by adding thereto, "unless the jury find that defendant waived the truth of the representations made by insured." *Ib.*

14. **Vexatious Refusal to Pay: Instructions.** In an action on a life insurance policy, where the court instructed the jury that if the refusal of the company to pay was vexatious—that is, without reasonable cause—they might allow interest and a reasonable attorney's fee, it was not error to refuse a requested instruction further defining "vexatious" since the instruction given sufficiently defined that term. *Ib.*
15. **Examining Physician: Agency.** A physician who examines an applicant for life insurance at the instance of insurer is an agent of insurer. *Ib.*
16. **Misrepresentation in Application: Instructions.** In an action on a life insurance policy, defended on the ground of misrepresentation in the application concerning the health of insured, an instruction that if the jury found that the insured, or any one for her, made known her condition to an agent, or superintendent, or examining physician, or if such agent, superintendent, or medical examiner knew of such fact, his knowledge would be the knowledge of the company, and, if the company with said knowledge issued and delivered the policy, it waived the defense, was not erroneous, as imputing to the company the knowledge of every agent it might have, where the evidence showed that the agents who had such knowledge were the examining physician and the assistant manager or superintendent. *Ib.*
17. **Forfeiture: Waiver by Retention of Premiums.** Where the beneficiary of a life insurance policy paid premiums thereon, after nonpayment for a sufficient period to cause the policy to lapse, without furnishing evidence of the insurability of insured, as required by the policy, and insurer retained the same, insurer was precluded from insisting upon a forfeiture, since it could not retain the benefits and at the same time be permitted to deny the existence of the contract; and the fact that insurer's agent, in accepting the payments, gave a temporary receipt, stating that it was given on condition that insurer would not be liable on the policy unless it was in force when the payments were made, did not alter the situation; and likewise a tender of such premiums into court, after action was brought on the policy, was unavailing, because too late. *Jaggi v. Ins. Co.*, 384.
18. **Binding Effect of Trial Theory.** In an action on an industrial life insurance policy, instituted in a justice's court and appealed to the circuit court, where it was tried *de novo*, insurer not having, in the latter court, raised the point that plaintiff was not within any of the classes in the facility of payment clause in the policy and hence had no capacity to sue, would not be heard on such point in the Court of Appeals. *Ib.*
19. **Assessment Plan: Fraternal Beneficiary Associations: Misrepresentations.** Sections 6937 and 6986, R. S. 1909, which provide that no misrepresentation made in obtaining a life insurance policy shall be deemed material or render the policy void, unless the matter misrepresented actually contributes to the death, relate to insurance contracts entered into on the stipu-

LIFE INSURANCE—Continued.

lated premium plan only, and the doctrine of warranty, which, prior to the enactment of these statutes, applied to insurance contracts of all kinds, still applies to insurance on the assessment plan, or fraternal in character, and, in either case, the law exacts literal compliance with the warranty, rather than mere substantial compliance, which suffices in the case of representations. *Kribs v. Foresters*, 524.

20. **Same: Misrepresentations: Statements Written by Insurer's Agent.** Where an applicant for insurance on the assessment plan signed the application on the representation that the physician of insurer, who examined him, would fill in the blanks, statements subsequently written in the application by the physicians could not be treated as a warranty by insured, so as to avoid the insurance, upon such statements proving to be false, unless the application accompanied the policy, and insured retained it with knowledge of the false statements. *Ib.*
21. **Same: Instructions.** In an action on a life insurance policy on the assessment plan, defended on the ground that insured had made misrepresentations in his application, where there was evidence on behalf of plaintiff that insured signed the application on the representation that the physician of insurer, who examined him, would fill in the blanks, that the physician inserted the answers that were claimed to be false by defendant, and that the application did not accompany the policy and insured had no knowledge of the false statements that were made, an instruction, given for defendant, which instructed a verdict for defendant if insured signed the application and the statements therein made were untrue, was erroneous, for the reason that it ignored plaintiff's evidence concerning the acts of defendant's physician. *Ib.*
22. **Same: Rejection of Applicant by "Association."** A statement that an applicant for life insurance on the assessment plan had never been rejected by any "physician, company or association" is shown to be false by proof that a fraternal beneficiary association or its physician had rejected the applicant; the word "association" including fraternal beneficiary associations and other organizations of like character. *Ib.*
23. **Fraternal Beneficiary Associations: Character of Insurance: Method of Determining.** Whether a life insurance contract provides for insurance on the assessment plan or evidences a contract which is subject to the laws relating to fraternal beneficiary associations depends, not on the nature of the order issuing the contract, but on the terms and character of the contract, although the order was licensed to conduct business as a fraternal beneficiary association prior to the issuance of the contract. *Ib.*
24. **Same: Character of Insurance: Facts Stated.** The by-laws of a fraternal insurance order, possessing a representative form of government, a lodge system and ritualistic work, and conducting an insurance business by levying fixed monthly assessments and dues going into a common fund, declared that members taking term certificates, should pay monthly for each \$1000 benefit the amount shown by a table, and authorized special assessments to pay all claims against the fund, and provided that the beneficiary of each term member should participate in the fund to the extent of the net amount realized from one assess-

LIFE INSURANCE—Continued.

ment on all of its term members, not exceeding the amount named in the benefit certificate, but if there is sufficient money in the fund, the executive council may, in its discretion, pay the amount named in the certificate. The order, which was admitted to do business in this State as a fraternal beneficiary association, issued a certificate in this State, binding it to pay, at the death of the member, the net amount realized by the order in its term insurance fund from one assessment on all members, not exceeding a specified sum. *Held*, that the insurance was on the assessment plan under Sec. 6950, R. S. 1909, and that, under Sec. 6952, the beneficiary could recover the face of the policy, instead of the amount of one assessment; section 6962, exempting fraternal beneficiary associations, not being applicable. *Ib*.

LIMITATIONS. See Statute of Limitations.

LOGS AND LOGGING. See Conveyances, 3.

MANDAMUS.

Right to Writ. In order for mandamus to be available, it is essential that the relator have a clear legal right to the thing demanded, and it must be the imperative duty of the respondent to perform the act required. *State ex rel. v. Appling*, 589.

MARRIED WOMEN.

1. **Equity: Jurisdiction: Effect of Enactment of Married Women's Act.** The power of courts of equity to protect the separate estate of the wife against the marital rights of her husband and the claims of his creditors was not restricted by the enactment of the Married Women's Acts, the design of which is to enlarge, and not restrain, the remedies of *femmes covert*. *Mathias v. Arnold*, 352.
2. **Injunctions: Right to Restrain Sale of Wife's Property for Husband's Debt.** Under Sec. 2534, R. S. 1909, in view of Secs. 8308 and 8309, as well as under the general jurisdiction possessed by courts of equity to protect the separate estate of a married woman from the claims of her husband or his creditors, an injunction will lie to restrain the sale of a wife's real property under an execution issued upon a judgment against her husband. *Ib*.
3. **Same: Pleading: Damages.** A petition for an injunction to restrain the sale of a wife's real property under an execution issued upon a judgment against her husband need not plead the injurious consequences resulting from the execution and sale of the wife's property with particularity, since prejudice will be presumed from the doing of prohibited acts. *Ib*.
4. **Statute of Limitations: Disabilities of Married Women.** The provisions of the Statute of Limitations, relating to the time for bringing an action for fraud, do not, under Sec. 1894, R. S. 1909, apply to married women; and, under Sec. 1896, the personal representative of a deceased married woman may bring such an action within one year after her death. *O'Malley v. Musick*, 405.

MASTER AND SERVANT. See Common Carriers, 1, 2; Work and Labor.

1. **Injury to Servant: Evidence: Sketches.** In an action for the death of an employee from moving shafting in a mill, which was

MASTER AND SERVANT—Continued.

destroyed by fire after the injury, a sketch made from a photograph of the interior of the mill, showing the position of the shafting and the immediate surroundings, which was identified by witnesses as a fairly accurate representation, and was used merely to illustrate their descriptions, and not as independent evidence, was properly admitted in evidence, notwithstanding the fact that the photograph was neither produced nor accounted for. *Daniels v. Goeke*, 1.

2. **Same: Competency of Witnesses: Transactions with Deceased Person.** The inhibition in Sec. 6354, R. S. 1909, against the surviving party to a contract or cause of action, or one claiming under him, testifying, when the other party is dead; applies only to the parties to the contract or cause of action, or those claiming under them, and their agents and attorneys; and hence, in an action for the death of an employee in a mill, from injuries sustained from moving shafting, it was proper to permit a State factory inspector to testify concerning a conversation he had with the superintendent of the mill, since deceased, relative to the shafting, since the factory inspector was in no way interested in the action. *Ib.*
3. **Same: Placing Belt on Moving Machinery: Contributory Negligence.** An employee in a mill, who was killed by being caught while attempting to replace a belt on a pulley, was not guilty of contributory negligence as a matter of law in attempting to replace the belt without stopping the machinery, since that is the method ordinarily employed, and it is almost impossible to put a belt on a dead pulley. *Ib.*
4. **Same.** An employee in a mill, who was killed by being caught while attempting to replace a belt on a pulley, was not guilty of contributory negligence as a matter of law in stepping over the belt, since it did not appear that he could have got around it or under it, and it was necessary for him, in the course of his ordinary duties, to adjust it. *Ib.*
5. **Injury to Foreman: Liability of Master.** Although, to a limited extent, a foreman is considered a vice-principal, he may nevertheless recover for injuries resulting from defective appliances furnished by the master that are not reasonably safe. *Ib.*
6. **Injury to Servant: Choice of Method: Contributory Negligence.** An employee in a mill, who was killed while attempting to replace a belt on a pulley, was not negligent as a matter of law, on the ground that he attempted to replace the belt while the machinery was moving, instead of stopping it, and thus choosing a dangerous, rather than a safe, way to do the work, since where there are two ways of doing the work, one dangerous and the other not so hazardous, both furnished by the employer with the intention that the employee may use either, at his discretion, the employer cannot defeat a recovery for injuries to the employee on the ground that he chose the more dangerous method. *Ib.*
7. **Same: Unguarded Machinery: Question for Jury.** In an action for injuries sustained by a servant from moving shafting in a manufacturing establishment, it is a question for a jury, under Sec. 7828, R. S. 1909, whether the machinery in question could have been safely and securely guarded without materially interfering with its efficiency. *Ib.*

MASTER AND SERVANT—Continued.

8. **Same: Evidence.** In an action for the death of an employee in a mill from an injury sustained by being caught by a set screw on moving shafting, the fact that the State factory inspector had called the employer's attention to the screw, and had cautioned him that it was dangerous and should be guarded, several weeks before the injury, while of no force as imposing liability on the employer or as an official notice fixing liability, was of probative value, as tending to show knowledge of the danger by the employer. *Ib.*
9. **Same.** In an action for the death of an employee in a mill from an injury sustained by being caught by a set screw on moving shafting, evidence *held* sufficient to warrant submission to the jury of the question of whether the set screw could have been or should have been guarded, as required by Sec. 7828, R. S. 1909. *Ib.*
10. **Same: Sufficiency of Guard.** A grain conveyer a few feet in front of shafting, under which an employee had to go to reach the shafting, was not a guard of the shafting, satisfying the requirements of Sec. 7828, R. S. 1909. *Ib.*
11. **Injury of Third Person by Servant: Liability of Master.** A chauffeur in the employ of the owner of an automobile drove the owner to church in Kansas City. On getting out at the church, the owner ordered the chauffeur to go after his son at a place about nine blocks west of the church, bring the son to the church and there wait to take them home when services were over. The chauffeur drove several blocks in an opposite direction to collect a debt owing to him by a friend, collected the debt and invited his friend to ride back with him on the same seat. At his friend's request he let him handle the steering wheel and drive the machine. On their way back to where the owner's son was, the machine collided with a hearse and injured those in charge of it. It was *held* that the owner was liable, even though his machine was being driven by the chauffeur's friend at the time of the collision. *Slothower v. Clark*, 105.
12. **Same.** Orders of care in driving an automobile and directions not to let any one else drive it will not excuse the owner from an act of the chauffeur injuring another, though it occurred on account of violating such orders. *Ib.*
13. **Same.** The fact that the chauffeur in obeying instructions of the master to go to a certain place, drives the automobile out of a direct course, to another place on an errand of his own will not free the master of liability for an injury to a third party in a collision occurring on the way back to the place he was directed to go. *Ib.*
14. **Same.** If a chauffeur in charge of the master's automobile invites a friend to ride on the seat with him and permits the friend to take charge of the steering wheel and run the machine, and the latter negligently collides with a hearse and injures those in charge of it, the master is liable. *Ib.*
15. **Safe Place to Work: Rest Room for Servants.** Where a master provided a rest room in which the telephone operators were required to go at stated periods during the day and rest as part of their duties, an operator, who, when the rest period arrived,

MASTER AND SERVANT—Continued.

had left the board and gone to the rest room as required was still in her line of duties and was required to be in the regular performance of her work. In such case the duty rested upon the defendant master to see that the rest room was maintained in a reasonably safe condition. *Mullery v. Telephone Co.*, 118.

16. **Delegation of Duties.** The master cannot delegate to an independent contractor the duty to use reasonable care to furnish his servants with a reasonably safe place in which to work. Where one is charged with a duty arising from a legal obligation which he can devolve upon another, the rule as to independent contract does not apply. *Ib.*
17. **Injury to Servant: Sufficiency of Evidence.** The plaintiff, a minor, was operating a leveler machine in the defendant's shoe factory and sues to recover damages for injury to one of his thumbs. The machine which he was operating had two treadles, and while he was endeavoring to pull a shoe from the last, he lost his balance, inadvertently stepped on the wrong treadle, and the thumb of his left hand was caught and mashed. *Held*, that the demurrer to the evidence was properly overruled. *Bulson v. Shoe Co.*, 128.
18. **Same: Failure to Instruct Minor.** The master is liable for failure to instruct a minor unless both the danger and the means of avoiding it are apparent and within the comprehension of the servant. And where the servant is a minor, the master must put his warnings in such language as to be sure that the servant understands and appreciates the danger. It is not enough that he should do his best to make the servant understand, he must actually understand and appreciate the danger. *Ib.*
19. **Same: Instructions.** It is error to submit, in an instruction, a question, raised in the petition, of negligence in failing to instruct plaintiff in the use of the brake, and of whether or not such negligence was the proximate cause of the injury, when the plaintiff's own evidence demonstrates beyond question that the absence of instructions relating to the use of the brake or clutch could not have been a proximate cause. *Ib.*
20. **Railroads: Injury to Employee: Federal Employer's Liability Act.** The plaintiff sued to recover damages from defendant, for the negligent placing of a piece of "scrap" or "junk" rubber hose, so that when plaintiff descended a ladder on which he had been working cleaning an engine he stepped upon it thereby severely spraining his ankle. *Held*, that defendant's demurrer to the evidence was properly overruled. *Cross v. R. R.*, 202.
21. **Same.** The Federal Employer's Liability Act abrogates the rule regarding contributory negligence and merely permits such negligence to diminish the damages. *Ib.*
22. **Same: Assumption of Risk: Federal Rule: Missouri Rule.** When the employee knows of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer, or his representative, an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. Such, however, is not the Missouri rule. *Ib.*
23. **Same: Instructions: Damages, Measure of.** An instruction on the measure of damages regarding the contributory negligence of

MASTER AND SERVANT—Continued.

- plaintiff which states: "Then such damage should be diminished by the jury in proportion to the amount of negligence attributable to him, as compared with the negligence, if any, attributable to the defendant" is erroneous. *Ib.*
24. **Injury to Servant: Safe Place to Work: Delegating Master's Duty.** Two parallel car tracks entered defendant's house and a freight car stood on each. One was filled with sugar in sacks which were loaded onto a four-wheeled truck; the truck was then pulled out of the car onto a runway which carried it over to the other car, thence it was pulled through that car onto another runway, carrying it to a dock where it was to be unloaded. The end of the runway was negligently fastened inside the last car by another employee, and as plaintiff attempted to pull the truck through the car onto the runway, it slipped out of position and fell to the ground with plaintiff and the truck whereby he was injured. *Held*, that it was the master's duty to see that the runway was reasonably safe, and though he deputized that duty to another employee, he was liable for the latter's negligence. *White v. Montgomery Ward & Co.*, 268.
25. **Same.** A master who deputizes a servant to perform one of his positive duties to other servants, cannot escape liability for the deputy's negligence, no matter how low down in the scale of employment the latter may be. *Ib.*
26. **Injury to Servant: Safe Place to Work: Question for Jury.** In an action by an employee for injuries sustained in jumping from a scaffold formed by a narrow plank laid across two stepladders, when a heavy board which he was holding in position toppled over and was about to fall upon him, evidence *held* sufficient to justify a finding that defendant was negligent in furnishing a scaffold which, by reason of its narrowness and insecurity, did not afford a reasonably safe place for plaintiff to do his work; *held, further*, under the evidence, that plaintiff was not guilty of contributory negligence as a matter of law in using the scaffold, or in permitting the board to topple over. *Price v. Bldg. Co.*, 395.
27. **Same: Contributory Negligence.** An employee injured while using an appliance furnished by the master cannot be held guilty of contributory negligence as a matter of law in using the appliance, unless the danger therefrom was so glaring and obvious as to deter a reasonably prudent man from using it. *Ib.*
28. **Same: Assumption of Risk.** An employee does not assume a risk created by the employer's negligence. *Ib.*
29. **Same: Instructions: Submitting Unnecessary Facts.** In an action by an employee for injuries sustained in jumping from a scaffold formed by a narrow plank laid across two stepladders, when a heavy board which he was holding in position toppled over and was about to fall upon him, an instruction given for plaintiff, which required the jury to find that the scaffold, as constructed, was too narrow and was unstable and insecure and that there was insufficient room thereon for plaintiff to work and move about, and by reason thereof his footing was rendered insecure and he was prevented from so bracing himself as to enable him to hold the board in place and prevent it from becoming overbalanced and falling, and that the "scaffold was so narrow that if said board did fall, there was no room thereon for

MASTER AND SERVANT—Continued.

plaintiff to get out of the way," was not objectionable, because of the quoted words, on the ground that defendant could not have anticipated that the board would fall and, therefore, was not required to furnish a scaffold wide enough to allow plaintiff to step back far enough to avoid injury, since liability was not predicated upon any such duty and the instruction merely required a finding on those facts conjunctively with a finding on the theory upon which liability was predicated. *Price v. Bldg. Co.*, 395.

30. **Injury to Servant: Safe Place to Work: Question for Jury.** In an action by an employee for injuries sustained while employed as a shift foreman in charge of defendant's cement plant, by falling through a manhole into a coal bin, brought on the ground of negligence in not providing sufficient lights in and about that part of the plant, *held*, under the evidence, that the questions of negligence and contributory negligence were for the jury. *Yost v. Cement Co.*, 422.
31. **Same: Insufficient Light.** The duty to furnish light—that is, to exercise ordinary care to see that a place of work is so lighted at night as to make it a reasonably safe place for an employee to pass over in the performance of his duty—is a continuing duty resting upon the master, for the breach of which, proximately resulting in injury to the employee, in the exercise of ordinary care for his own safety, the master is liable. *Ib.*
32. **Same: Assumption of Risk.** Where a master is negligent in failing to exercise ordinary care to perform the continuing duty to furnish an employee with a reasonably safe place in which to work, the danger arising therefrom is not a risk assumed by the employee. *Ib.*
33. **Same: Instructions: Assumption of Facts.** In an action by an employee for injuries sustained while employed as a shift foreman in charge of defendant's cement plant, by falling through a manhole into a coal bin, brought on the ground of negligence in not providing sufficient lights in and about that part of the plant, *held* that an instruction submitting plaintiff's theory of defendant's negligence, which did not require the jury to find that there was any negligence on the part of defendant in leaving the manhole open, but did require a finding that it was in fact open and that defendant had negligently failed to cause the premises in question to be so lighted as to enable plaintiff to discover such opening "in the ordinarily careful performance of his duties, and that plaintiff, by reason of said negligence and want of care, if any, on the part of defendant, and as the result thereof, and without fault on his part, fell into said coal tank," whereby he was injured, was not objectionable as assuming some negligence on defendant's part with respect to such manhole. *Ib.*
34. **Injury to Railroad Engineer: Sufficiency of Evidence.** In an action for injuries to a locomotive engineer by an explosion of his engine, evidence *held* insufficient to justify a finding that the crown sheet, as distinguished from the stay bolts, was defective, and hence it was proper to withdraw that issue from the jury. [NORTONI, J., dissents.] *Sparkman v. R. R.*, 463.
35. **Injury to Servant: Burden of Proof.** An employee, suing for personal injuries, has the burden of proving negligence of the

MASTER AND SERVANT—Continued.

employer and a causal connection between such negligence and the injury; and, where the injury might have resulted from one of two causes, for only one of which the employer is liable, the employee must show with reasonable certainty that the cause for which the employer is liable produced the injury. *Ib.*

36. **Discharge of Servant: Acceptance of Gifts: Question for Jury.** In an action by a buyer for a department store, who claimed that he had been wrongfully discharged before the end of his contract term, for salary for the balance of the term, defended on the ground that he had accepted gifts and gratuities from a firm with whom he, from time to time, negotiated purchases on behalf of the store, the evidence tended to prove that such gifts, all of which were given at Christmas, came to plaintiff unexpectedly and without solicitation, and were more or less business or social courtesies, arising out of the social relations between plaintiff and his wife and the officers of the firm, that they were of insignificant value as compared with the amount of the purchases from the firm, that plaintiff's orders practically confined him to buying from that firm, and that defendant's general manager was so well satisfied with plaintiff's success in his purchases that he made plaintiff a present of substantial value. *Held*, that it was a question for the jury whether the receipt of such gifts had a tendency to corrupt plaintiff and turn him from the loyalty he owed to his employer, and that the gifts did not, as a matter of law, have that tendency, especially as defendant made an issue of fact as to such question, by alleging in its answer that the acceptance of the presents without defendant's knowledge was sufficient to justify an employer, acting reasonably, to lose the confidence required and contemplated by the nature of the relation, and constituted a breach of the contract of employment. *Wade v. Dry Goods Co.*, 629.

MECHANICS' LIENS. See Principal and Surety, 1.

1. **Estoppel: Agency of Husband.** A husband entered into a contract for the erection of a house on his wife's lot. The husband and wife lived at premises adjoining the lot on which the house was erected, and the wife was on the lot many times while the house was being erected, and knew that it was intended for their home. The husband borrowed money to erect the house, to secure which the wife and husband pledged a deed of trust on the property, executed by them; the wife knowing that the proceeds of the loan were to be used in completing the house. The wife did not authorize the husband to build the house, and told him that she objected to his doing so, but did not make her objection known to anyone else. In an action to enforce a mechanic's lien against the house and lot, for material used in constructing the house, and not paid for, *held* that the wife was estopped, as a matter of law, from denying the agency of her husband, and hence her property was subject to the mechanic's liens. *Boeckeler Lumber Co. v. Wahlbrink*, 334.
2. **Estoppel of Lienors by Silence.** In an action to enforce a mechanic's lien for material used in the construction of a building, it appeared that an officer of plaintiff corporation, when asked by the owner whether the contractor owed it any money for material furnished for the building, answered that the contractor owed it some money, he thought, but that he did not know whether or not it was on the building in question, and that he would look the matter up and let the owner know.

MECHANICS' LIENS—Continued.

The owner then told plaintiff's officer that he was going to settle with the contractor "by a certain date," and would deduct whatever was owing plaintiff, if anything, for material that had not been paid for. About ten days thereafter, not having heard from plaintiff, he settled with the contractor; but whether or not that was within or after the date specified in the conversation with plaintiff's officer was not shown. *Held*, that the court should have instructed that, as a matter of law, plaintiff was not estopped from maintaining the action, on the theory that it was silent when it was under duty to speak, since plaintiff was not misled to his prejudice into the belief that the contractor was not indebted to plaintiff for material furnished for the building.

Held, by NORTONI, J., dissenting, that whether plaintiff was estopped by silence, was a question for the jury. *Boeckeler Lumber Co. v. Wahlbrink*, 334.

MINORS. See Divorce; Parent and Child.

MORTGAGES AND DEEDS OF TRUST. See Tender, 2.

MUNICIPAL CORPORATIONS. See Building Restrictions, 1, 2; Injunctions, 5, 6.

1. **Existence of Public Alley: Dedication: Facts Stated.** The owner of land dedicated a strip thereof for an alley, twenty feet wide, running east and west and which was not connected at either end with a street or dedicated alley. There was a traveled way from the east end of this dedicated strip, running diagonally across a vacant lot to a street; and another landowner, in conveying his land, reserved a strip of land, ten feet wide, for a proposed alley, connecting with the west end of the dedicated strip, and running westwardly to a street, and the other owners of abutting land erected their fences and out-buildings so as to leave open a strip twenty feet wide from the west end of the dedicated strip to such street. As thus located, the alley had been open and used and traveled by the public for probably twenty years, and the city, although it had never improved the surface of the alley, had laid a sewer main therein and had granted a telephone company the right to extend its wires along the same. *Held*, that the alley as thus located and created was not a mere paper alley, but was a public alley, open for public travel; there being an actual dedication by the owner who reserved the strip for an alley and a common-law dedication by the owners who constructed their fences and out-buildings so as to leave a strip for an alley, and an acceptance thereof by the public, by having used and traveled it as a public way. *O'Brien v. Heman*, 477.
2. **Injuries to Pedestrian: Nuisance Adjacent to Alley: Liability of Owner and Tenant.** Where the owner of abutting property constructs and maintains a nuisance adjacent to a highway, and lets the property in this condition, and the tenant continues to maintain or suffer the nuisance as before, both the landlord and the tenant are liable for injuries befalling one passing along the highway as a result of such nuisance. *Ib.*
3. **Same.** Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, the owners

MUNICIPAL CORPORATIONS—Continued.

and the tenant were both liable for the death of a traveler in the alley, who fell into the quarry through the chute. Ib.

4. **Same.** Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, and a traveler in the alley fell into the quarry through the chute and was killed, the fact that a portion of the chute extended across the corner of an adjoining lot, before reaching the alley, so that the adjoining owner was also liable, did not release the owners of the lot on which the quarry was situated, or their tenant, from liability, since it was their duty to protect against the nuisance created and maintained by them. Ib.
5. **Same: Evidence: Notice of Dangerous Condition.** In an action against a lotowner for the death of a child who, while walking in an alley, fell into a quarry, the sides of which had been allowed to cave in, so as to encroach on the alley, evidence that a policeman had requested the owners to guard the place to prevent injuries to persons using the alley was admissible to show notice to the lotowners of the dangerous condition existing, notwithstanding the policeman had no authority to make such request. Ib.
6. **Injury to Pedestrian: Defect in Street: Liability of Property Owner.** It is generally true that, in the absence of legislative enactment, an abutting landowner is not liable to travellers for injuries received by them, through a defect in the street adjoining his premises, unless such defect was caused by his act or fault; but this rule does not apply, where the defect was an excavation extending across the lot into an alley, so as to be a nuisance. *O'Brien v. Adding Mach. Co.*, 501.
7. **Same: Nuisance Adjacent to Alley: Liability of Property Owner.** The owner of a lot, next to one on which a quarry was located, who permitted a chute, caused by the caving of the earth into the quarry, and which extended from the quarry across a corner of his lot and into a public alley, to remain unguarded, after notice of its existence, was liable, jointly with the owner of the quarry, for the death of a traveller in the alley, who fell into the quarry through the chute, since such a dangerous place was a nuisance, and the owner was liable for permitting it to continue, although he did not create it. Ib.
8. **Alleys: Rights of Pedestrians.** A public alley is a highway for all travel, and not merely for the benefit of the adjoining lotowners, and a traveller injured thereon is an invitee, not a trespasser. Ib.
9. **Construction of Sewers: Sufficiency of Specifications: Delegation of Power.** An ordinance for the construction of aseptic tanks as part of a sewer system of a city of the fourth class, which provided that the tanks should have a sufficient capacity to purify the usual dry weather flow for a population of fifteen hundred people, that the sewage delivered to the tanks should be purified to the extent of ninety per cent. of solids, that the effluent discharge be not putrescible and be free from color and
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MUNICIPAL CORPORATIONS—Continued.

odor, and that the tanks should be built in such manner and of such material as to be satisfactory, in point of strength, to the city engineer, sufficiently stipulated the character of the tanks, within Sec. 9384, R. S. 1909, and the provision committing to the engineer the matter of material and strength was, at most, an irregularity, and did not render the contract for the construction of the tanks, in accordance with the ordinance, void. *Schueler v. Kirkwood*, 575.

10. **Same: Sufficiency of Acceptance of Work.** The fact that the board of aldermen of a city of the fourth class accepted, by resolution, instead of by ordinance, aseptic tanks constructed by a contractor, as a part of the sewer system of the city, did not affect the right of the contractor to recover the reasonable value of the work. *Ib.*
11. **Public Improvements: Irregular Exercise of Powers: Estoppel: Recovery on Quantum Meruit.** Where power has been conferred on a city to make a contract, and services have been rendered in compliance therewith, and the city retains the benefit thereof, the city is estopped to deny a recovery for the reasonable value of the work, asserted independently of the contract, though predicated on its fulfillment, on the ground that the contract was irregular in some respect, or that the power to enter into it was exercised defectively; but, in such a case, the recovery must not exceed the contract price. *Ib.*
12. **Construction of Sewers: Installation of Aseptic Tanks: Powers of City.** Under Sec. 9384, R. S. 1909, conferring power on cities of the fourth class to establish sewers, such a city may provide by an ordinance and a contract thereunder for the installation of aseptic tanks as a part of a sewer system to be constructed, although the power to install such tanks is not directly conferred; and where a city of the fourth class undertook, by an ordinance and a contract thereunder, to provide for the installation of aseptic tanks as a part of a sewer system to be constructed, the fact that the ordinance provided for such tanks was, of itself, a determination by the city that the tanks were indispensable to its sewer system, satisfying the rule that, where a city relies on an implied power, the thing it undertakes to do must be indispensable. *Ib.*
13. **Officers: Presumption of Correct Action.** Where nothing to the contrary appears, the law presumes that city authorities did not exceed the power conferred upon them. *Ib.*
14. **Public Improvements: Stipulation for Payment from Special Fund: Right of Recovery by Contractor.** Where a contractor performs services for a municipality under an ordinance or contract stipulating that his compensation shall be from a special fund to be raised therefor, and such fund, when accumulated, is diverted by the municipality to another purpose, the diversion is a breach of trust, and the contractor may enforce his claim against the general revenue of the municipality; and this is true, notwithstanding the fund was raised by levying taxes under an ordinance which was subsequently declared unconstitutional, since taxes voluntarily paid under a void levy cannot be recovered. *Ib.*
15. **Employment and Compensation of Officers: Right to Dispense with Special Services.** Where the salary of a city marshal

MUNICIPAL CORPORATIONS—Continued.

was fixed by ordinance, the fact that his predecessors were paid, and that, during a certain period, he was paid, additional compensation for acting as night watchman, pursuant to a resolution adopted by the board of aldermen, did not entitle him to receive such additional compensation after his services as night watchman were dispensed with by the board, since it was within the power of the board to dispense with such services, after which he was entitled only to the salary fixed by ordinance. *State ex rel. v. Appling*, 589.

NEGLIGENCE. See **Common Carriers**, 1, 2, 15; **Damages**, 1, 2, 4, 5, 6; **Instructions**, 3; **Master and Servant**; **Municipal Corporations**, 2, 3, 4, 5; **Parent and Child**, 8; **Physicians and Surgeons**; **Railroads**, 1; **Street Railways**, 1.

1. **Pleading and Proof: Acts of Negligence.** Where a plaintiff pleads and proves two or more negligent acts and proves that his injury must have been the direct result of one or all of them he is not required to go further and distinguish by proof the particular one that caused his injury. To satisfy his burden, it is enough for him to show that his injury resulted from a specific wrongful act of defendant. *Mullery v. Telephone Co.*, 118.
2. **Automobile: Chauffeur: Orders: Liability.** A chauffeur in the employ of the owner of an automobile drove the owner to church in Kansas City. On getting out at the church, the owner ordered the chauffeur to go after his son at a place about nine blocks west of the church, bring the son to the church and there wait to take them home when services were over. The chauffeur drove several blocks in an opposite direction to collect a debt owing to him by a friend, collected the debt and invited his friend to ride back with him on the same seat. At his friend's request he let him handle the steering wheel and drive the machine. On their way back to where the owner's son was, the machine collided with a hearse and injured those in charge of it. It was *held* that the owner was liable, even though his machine was being driven by the chauffeur's friend at the time of the collision. *Slothower v. Clark*, 105.
3. **Same.** Orders of care in driving an automobile and directions not to let any one else drive it will not excuse the owner from an act of the chauffeur injuring another, though it occurred on account of violating such orders. *Ib.*
4. **Same: Indirect Course: Private Errand.** The fact that the chauffeur in obeying instructions of the master to go to a certain place, drives the automobile out of a direct course, to another place on an errand of his own will not free the master of liability for an injury to a third party in a collision occurring on the way back to the place he was directed to go. *Ib.*
5. **Same: Chauffeur: Invited Friend: Negligence.** If a chauffeur in charge of the master's automobile invites a friend to ride on the seat with him and permits the friend to take charge of the steering wheel and run the machine, and the latter negligently collides with a hearse and injures those in charge of it, the master is liable. *Ib.*
6. **Pleading: Specific Negligence: Proof of one Negligent Act Sufficient.** Where specific acts of negligence are pleaded, plain-

NEGLIGENCE—Continued.

tiff must recover, if at all, upon one or more of such negligent acts constituting a cause of action; but he need not prove every negligent act charged, and it is sufficient if, keeping within his petition, he prove actionable negligence. *Yost v. Cement Co.*, 422.

7. **Instructions: Conformity to Evidence.** In a negligence action, no matter how broad the petition may be, the instructions should submit only the specific negligence developed by the evidence, and it is proper to withdraw, by instruction, issues pleaded that are not supported by the evidence. *Sparkman v. R. R.*, 463.
8. **Injuries to Pedestrian: Nuisance Adjacent to Alley: Liability of Owner and Tenant.** Where the owner of abutting property constructs and maintains a nuisance adjacent to the highway, and lets the property in this condition, and the tenant continues to maintain or suffer the nuisance as before, both the landlord and the tenant are liable for injuries befalling one passing along the highway as a result of such nuisance. *O'Brien v. Heman*, 477.
9. **Same.** Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, the owners and the tenant were both liable for the death of a traveler in the alley, who fell into the quarry through the chute. *Ib.*
10. **Same.** Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, and a traveler in the alley fell into the quarry through the chute and was killed, the fact that a portion of the chute extended across the corner of an adjoining lot, before reaching the alley, so that the adjoining owner was also liable, did not release the owners of the lot on which the quarry was situated, or their tenant, from liability, since it was their duty to protect against the nuisance created and maintained by them. *Ib.*
11. **Same: Evidence: Notice of Dangerous Condition.** In an action against a lotowner for the death of a child who, while walking in an alley, fell into a quarry, the sides of which had been allowed to cave in, so as to encroach on the alley, evidence that a policeman had requested the owners to guard the place to prevent injuries to persons using the alley was admissible to show notice to the lotowners of the dangerous condition existing, notwithstanding the policeman had no authority to make such request. *Ib.*
12. **Injury to Pedestrian: Defect in Street: Liability of Property Owner.** It is generally true that, in the absence of legislative enactment, an abutting landowner is not liable to travellers for injuries received by them, through a defect in the street adjoining his premises, unless such defect was caused by his act or fault; but this rule does not apply, where the defect was an excavation extending across the lot into an alley, so as to be a nuisance. *O'Brien v. Adding Mach. Co.*, 501.

NEGLIGENCE—Continued.

13. **Same: Nuisance Adjacent to Alley: Liability of Property Owner.** The owner of a lot, next to one on which a quarry was located, who permitted a chute, caused by the caving of the earth into the quarry, and which extended from the quarry across a corner of his lot and into a public alley, to remain unguarded, after notice of its existence, was liable, jointly with the owner of the quarry, for the death of a traveller in the alley, who fell into the quarry through the chute, since such a dangerous place was a nuisance, and the owner was liable for permitting it to continue, although he did not create it. *Ib.*
14. **Same.** Although the owner of property did not actually create a nuisance thereon, nevertheless if he continues to suffer it to exist on his premises, after notice, so that one rightfully about it as an invitee is injured because of it, he is liable for damages therefor. *Ib.*
15. **Instructions: Necessity of Submitting Specific Negligence.** In a negligence action, an instruction authorizing a recovery by plaintiff without requiring a finding on the specific acts of negligence counted on is erroneous. *Humphreys v. R. R.*, 710.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEW TRIAL. See Appellate Practice, 17, 18.

1. **Granting New Trial: Remarks of Trial Court: Review.** An appellate court will not interfere, where the court below has refused to grant a new trial because of remarks of the court in the hearing of the jury, alleged to have been prejudicial to the complaining party, unless it is convinced, from an examination of the whole record, that the remarks were of such a character as to constitute prejudicial error. *Copeland v. Ins. Co.*, 435.
2. **Same.** The matter of granting a new trial on account of remarks made by the trial court during the trial rests almost exclusively within the sound discretion of that court, and hence, although such remarks are not such as would have justified the appellate court in reversing the judgment, had the motion for new trial been overruled, nevertheless where the trial court grants a new trial on account thereof, such order will not be interfered with, or appeal, unless the trial court palpably abused its discretion in making it. *Ib.*
3. **Same.** On appeal from an order granting a new trial on account of remarks made by the trial court during the trial, *held* that, although the remarks were not such as would have justified a reversal of the judgment, had the motion for a new trial been overruled, nevertheless it was within the power of the trial court to grant a new trial on account thereof, and, in view of the fact that the evidence was evenly balanced and that the verdict was concurred in by nine jurors only, the appellate court could not say that the trial court palpably abused its discretion in granting a new trial. *Ib.*

NUISANCES.

1. **Injuries to Pedestrian: Nuisance Adjacent to Alley: Liability of Owner and Tenant.** Where the owner of abutting property constructs and maintains a nuisance adjacent to the highway, and lets the property in this condition, and the tenant continues

NUISANCES—Continued.

- to maintain or suffer the nuisance as before, both the landlord and the tenant are liable for injuries befalling one passing along the highway as a result of such nuisance. *O'Brien v. Heman*, 477.
2. **Same.** Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, the owners and the tenant were both liable for the death of a traveler in the alley, who fell into the quarry through the chute. *Ib.*
 3. **Same.** Where the owner of a lot dug a quarry thereon, adjacent to a public alley, without guarding it in any way, and allowed the side to cave in, so as to form a dangerous chute from the alley into the quarry, and then let the premises in that condition to a corporation, which maintained the nuisance, and a traveler in the alley fell into the quarry through the chute and was killed, the fact that a portion of the chute extended across the corner of an adjoining lot, before reaching the alley, so that the adjoining owner was also liable, did not release the owners of the lot on which the quarry was situated, or their tenant, from liability, since it was their duty to protect against the nuisance created and maintained by them. *Ib.*
 4. **Same: Evidence: Notice of Dangerous Condition.** In an action against a lotowner for the death of a child who, while walking in an alley, fell into a quarry, the sides of which had been allowed to cave in, so as to encroach on the alley, evidence that a policeman had requested the owners to guard the place to prevent injuries to persons using the alley was admissible to show notice to the lotowners of the dangerous condition existing, notwithstanding the policeman had no authority to make such request. *Ib.*
 5. **Injury to Pedestrian: Defect in Street: Liability of Property Owner.** It is generally true that, in the absence of legislative enactment, an abutting landowner is not liable to travelers for injuries received by them, through a defect in the street adjoining his premises, unless such defect was caused by his act or fault; but this rule does not apply, where the defect was an excavation extending across the lot into an alley, so as to be a nuisance. *O'Brien v. Adding Mach. Co.*, 501.
 6. **Same: Nuisance Adjacent to Alley: Liability of Property Owner.** The owner of a lot, next to one on which a quarry was located, who permitted a chute, caused by the caving of the earth into the quarry, and which extended from the quarry across a corner of his lot and into a public alley, to remain unguarded, after notice of its existence, was liable, jointly with the owner of the quarry, for the death of a traveller in the alley, who fell into the quarry through the chute, since such a dangerous place was a nuisance, and the owner was liable for permitting it to continue, although he did not create it. *Ib.*
 7. **Liability for Maintenance of Nuisance.** Where one creates a nuisance on his premises, and passes it by deed or demise to another, who continues it there with knowledge, the person so continuing it is liable for resulting injuries, notwithstanding he did not create it. *Ib.*

NUISANCES—Continued.

8. **Same.** Although the owner of property did not actually create a nuisance thereon, nevertheless if he continues to suffer it to exist on his premises, after notice, so that one rightfully about it as an invitee is injured because of it, he is liable for damages therefor. *Ib.*

PARENT AND CHILD.

1. **Divorce: Custody of Children: Jurisdiction.** By reason of the separation and divorce of parents, their child becomes a ward of the court in which the decree of divorce is rendered, and jurisdiction to award the custody of such child vests in that court to the exclusion of all others. Such jurisdiction is a continuing one, giving the court power to modify its decree as to the custody of the child from time to time, as circumstances change and new conditions arise to make a modification necessary. *Meredith v. Krauthoff*, 149.
2. **Same: Rights of Parents.** The Act of 1913, Laws of Mo. 1913, page 91, in relation to the custody of children did not create a new rule or principle upon which cases involving the custody of children are to be decided, but merely placed the mother upon the same legal level with the father in respect of her eligibility to be selected as the custodian of her child. The right of neither parent is absolute, nor can it become so by contract or agreement. The custody of a child is in the nature of a trust and is upheld only so long as the duties of that trust are faithfully carried out. *Ib.*
3. **Same: Contracts Relating to Custody.** Parties cannot make a final and absolutely irrevocable contract concerning the custody of their child save in the method pointed out by statute by apprenticeships and deeds of adoption. Nor can the court which renders a decree of divorce make a final and absolute decree as to the custody of the child. It is subject to modification as new circumstances arise from time to time. *Ib.*
4. **Same: Guiding Principles.** In determining who shall have the custody of a child the supreme consideration to be ever kept in mind is the child's welfare. The rights of neither parent should be disregarded, but the welfare of the child is superior to the claims of either parent; even the wishes of the child itself must yield to that. *Ib.*
5. **Same: Evidence.** In cases involving the custody of children, the evidence takes a wide range. No other occasion can call more loudly for judicial vigilance in reaching for the exact truth. The attitude of the parents toward each other, the causes leading to the divorce, their treatment of each other, and the character of the parties are all material and admissible in evidence as bearing upon the question of the fitness of the respective parents to have the custody of their child. This should be considered solely in order to arrive at what is for the good of the child, and not in any way for the purpose of gratifying the wishes of one parent or the other, or with any idea of punishment or of rewarding either parent. *Ib.*
6. **Same: Facts Justifying a Change of Custody: Influencing Child Against Parent.** Any act on the part of one parent which tends, or will tend, to cause the child to lose respect for the other parent or prejudice the mind of the child against its parent

PARENT AND CHILD—Continued.

is an abuse of the trust. And where the evidence shows that the influences surrounding a child were such as to lead him to believe without cause that his father was not to be trusted; that he was not respected and had no standing in the community; that the father did not provide for him; that his father's family and relations were undesirable people all of which was without foundation; and that the child was led to imbibe unwholesome views of life; this will be deemed sufficient grounds for changing the custody of the child. *Meredith v. Krauthoff*, 149.

7. **Same.** The facts in this case considered and analyzed, it is held that, taking the whole cycle of the boy's career into consideration, and that he is now twelve-and-a-half years of age and about to enter upon one of the most critical periods of life and needs a father's advice and direction, and that at this age boys begin to escape their mother's apron strings and the influence and training of his father and the benefits of his father's society are what is best for him now, the custody of the boy should be, and is awarded to the father under certain conditions. *Id.*
8. **Injuries Inflicted by Child: Liability of Parent.** The question is discussed whether the father owning an automobile for use of himself and his family, is liable for the negligence of his son driving the automobile in escorting a young lady friend from church. *Tapscott v. Tyson*, 253.

PARTIES.

1. **Joinder: Maker and Guarantor.** A maker and a guarantor of a contract may be sued jointly. *Cockrell v. Williams*, 246.
2. **Real Party in Interest.** In an action for fraud in inducing plaintiff's intestate to exchange her land for nonexistent land, the fact that the intestate took the deed covering the nonexistent land in the name of her daughter was no ground for arresting a judgment for plaintiff, on the theory that plaintiff's intestate was not the real party in interest, since the intestate was the one defrauded of the property which she exchanged. *O'Malley v. Musick*, 405.
3. **Covenants: Action for Breach: Joinder of Wife.** In an action for the breach of a covenant in a deed, executed by a husband and a wife, conveying the husband's property, the wife is neither a proper nor a necessary party, in view of Sec. 2788, R. S. 1909, and where the petition declares upon a covenant made by the husband, the fact that the wife joined in the deed would not defeat a recovery, on the theory that there was a variance or failure of proof. *Stone v. Fry*, 607.

PARTITION.

1. **Allowances to Commissioners: Interest.** Allowances to commissioners in a partition suit, for their services, are within Sec. 7181, R. S. 1909, which provides that interest shall be allowed on money due on any judgment from the day of rendering the same until payment, and such allowances draw interest until paid, although the judgment making the allowances does not state expressly that they shall bear interest. *McManus v. Burrows*, 594.

PARTITION--Continued.

2. **Same: Right to Execution.** The fact that attorneys in a partition suit obtained an execution for their services against one of the parties adjudged to pay the same and that the execution was returned satisfied, did not affect the right of a commissioner to obtain an execution for the balance due on the amount awarded him as compensation for his services, against another of the parties, who was adjudged to pay the same. *Ib.*

PAYMENT. See Bills and Notes, 7, 8; Executors and Administrators, 6.

PHYSICIANS AND SURGEONS.

1. **Practicing Medicine Without License: Indictment: Joinder of Offenses.** An indictment, which in one court charges a defendant with practicing medicine without a license from the State Board of Health, and, also with failing to record his license in the county of his residence, is not a good indictment, because the latter offense is under section 8314, R. S. 1909, and the former under section 8315, R. S. 1909, and, further, because two or more distinct, separate offenses cannot be charged in the same count of an indictment. *State v. Huxoll*, 304.
2. **Same: Instructions.** An instruction which told the jury that they should find the defendant guilty if they believed from the evidence beyond a reasonable doubt that the defendant, for pay, treated the person, and, at the time of such treatment, if any, "had no license from the State Board of Health recorded in the office of the county clerk," etc., is erroneous. *Ib.*
3. **Malpractice: Evidence.** In an action against a surgeon for injuries to plaintiff's wife from a hot water bag, used to sustain her vitality during an operation, there was evidence that burns sometimes unavoidably occur through the moving of the patient while the anaesthetic is being administered, even though the utmost care is used, and there was also evidence that, except as stated, it was not proper practice to permit the patient to be burned. The court asked expert witnesses whether patients were frequently burned in such operations and whether there was danger of burning, and, when objection was made by plaintiff's counsel, on the ground that it was not competent to show that burns may have occurred in other instances, as the surgeons in such cases may have been careless, the court remarked that he did not know that his question was well framed, but that he had undertaken to get at the general experience of surgeons of skill and ability in operations of this kind. The witnesses answered that such burns did occur, and that there was such danger. *Held*, that these questions and answers were prejudicial, especially in connection with the court's explanation and in connection with the instructions, in which the court repeatedly charged, in different phraseology, that defendant was only required to exercise such care as an ordinarily skillful and careful surgeon was accustomed to exercise, since they did not discriminate between a case where a burn might have been inflicted through carelessness from one where the burn occurred, although due care was used, through an unexpected movement of the patient during the operation. *Reeves v. Lutz*, 550.
4. **Malpractice: Liability.** A physician cannot be held for an honest error of judgment, a mistake in matters of doubt, or an uncertainty, and where he uses a recognized system of treatment, he is not negligent. *Sontag v. Ude*, 617.

PHYSICIANS AND SURGEONS—Continued.

5. **Same: Sufficiency of Evidence.** In an action against a surgeon for the death of a child, alleged to have been caused by defendant's negligence in inserting a rubber drainage tube in an incision made in the child's body in such a manner that it could, and did, slip into his body, and in failing to discover that the tube had slipped into his body and in failing to remove the same, where the evidence showed that defendant inserted a rubber tube in an incision in the child's body made by him, leaving it unsecured, so that it slipped inside the body, and that the tube was allowed to remain there for some time, *held* that it was a question for the jury whether defendant was guilty of the negligence charged, and, if so, whether such negligence was the proximate cause of the child's death. *Sontag v. Ude*, 617.
6. **Same: Death by Wrongful Act: Cause of Death: Evidence.** In an action against a surgeon for the death of a child, alleged to have been caused by defendant's negligence in inserting a rubber drainage tube in an incision made in the child's body in such a manner that it could, and did, slip into his body, and in failing to discover that the tube had slipped into his body and in failing to remove the same, evidence that, before the tube dropped into the child's body, he showed no indications of suffering from a fatal malady, and that, immediately thereafter, he commenced to waste away, and finally died, justified an inference that the proximate cause of death was the dropping of the tube into the body, and it was not essential that expert evidence of that fact be adduced. *Ib.*
7. **Duty.** A physician, holding himself out as such, and undertaking the care and treatment of a baby for pay, owes the baby and its parents careful and skillful treatment. *Ib.*
8. **Malpractice: Instructions.** In an action against a surgeon for the death of a child, alleged to have been caused by defendant's negligence in inserting a rubber drainage tube in an incision made in the child's body in such a manner that it could, and did, slip into his body, and in failing to discover that the tube has slipped into his body and in failing to remove the same, *held* that an instruction given for plaintiff was not vulnerable to the objections that it assumed negligence, placed the burden on defendant to show that he was not negligent, submitted matters not supported by the evidence, or submitted issues outside of the scope of the pleadings; *held, further*, that plaintiff's instructions were not inconsistent with each other. *Ib.*
9. **Same: Pleading: Sufficiency of Petition.** In an action against a surgeon for the death of a child, the petition alleged that, while defendant was treating plaintiff's infant child, he performed an operation and made an incision in the child's body; that thereafter he opened this incision and inserted a tube therein for the purpose of draining the diseased part of the infant's body; that he so negligently and unskillfully inserted the tube that it could and did slip inside the body; that he thereafter discovered that it was lost, and might, by the exercise of ordinary care, have ascertained that it had slipped into the body, but that he negligently and unskillfully failed to locate and discover it and remove it; that, by reason of the tube remaining in his body, the child was made sick and grew worse, until some time later, when defendant discovered that the tube was in the body and operated on the infant; and that, by reason of these things, the infant continued to grow worse until he

PHYSICIANS AND SURGEONS—Continued.

died. Defendant attacked the petition, on appeal, on the ground that it was fatally defective, in that it did not allege specific acts of negligence—did not set out how and in what manner the tube was negligently inserted, nor specifically state what means, treatment, or operation could have been used or performed to discover the tube in the body. *Held*, that the petition was sufficient to support a judgment for plaintiff, and that, if it was defective in the particulars claimed by defendant, such defects could not be reached by demurrer. *Ib*.

PLEADING. See Bills and Notes, 9; Constitutional Questions, 1; Covenants, 2; Damages, 3; Divorce, 8; Fraudulent Conveyances, 1; Injunctions, 4; Justices' Courts, 3; Married Women, 3; Negligence, 1, 6; Physicians and Surgeons, 9.

1. **Motion for Judgment: Scope.** A motion for judgment on the pleadings and stipulation admits all facts well pleaded, as well as those covered by the stipulation. *Dessauer v. Maccabees*, 76.
2. **Attacking Fraudulent Conveyance: Receivers: Insufficient Petition.** Where a receiver is appointed in an action to set aside a conveyance of real estate for fraud and it appears that no cause of action is stated in the petition, the order appointing the receiver should be vacated. *Commercial State Bank v. Ankrum*, 251.
3. **Prayer of Petition: Interest.** Where the prayer of a petition was for the balance of the principal due on a promissory note, plaintiff was not entitled to recover interest thereon, since plaintiff cannot recover more than the amount for which he sues. *Moore v. McHaney*, 686.
4. **Prayer of Petition: Interest.** A recovery may not be had for an amount in excess of the prayer of the petition, and, in order to recover interest, the prayer should ask for it. *Humphreys v. R. R.*, 710.

PRACTICE. See Action; Appellate Practice; Constitutional Questions; Crimes and Punishments; Indictments and Informations; Justices' Courts; Parties; Pleading; Trial Practice.

PRESUMPTIONS.

Reliance on: Knowledge of Fact. A party litigant who is in possession of knowledge of the fact whether a debt from a third party is still owing him, must show the fact. He cannot be permitted to show that two and a half years prior to the trial the debt was owing to him and invoke a presumption that the debt still is owing at time of the trial. *Fifth-third National Bank v. McCrory*, 295.

PRINCIPAL AND AGENT. See Attachments, 1; Estoppel, 1; Life Insurance, 15; Mechanics' Liens, 1.

1. **Liability of Agent for Unauthorized Acts: Damages.** Where one purported to act for a principal in bidding on bonds at a sale by a commissioner appointed by the circuit court, when, in fact, he was unauthorized, the measure of damages, in an action against him by the commissioner, was the amount of his bid, which was the amount for which the commissioner was liable; the value of the bonds being immaterial.

PRINCIPAL AND AGENT—Continued.

Held, by ALLEN, J., dissenting, that plaintiff was not entitled to recover the amount defendant bid, but was entitled to recover only such damages as he sustained by reason of the wrongful assumption of authority by defendant, which damages could have been ascertained by a resale. *Griswold v. Haas*, 97.

2. **Attachment Bond: Authority of Agent: Ratification.** The administrator of Mullett brought this action on attachment bond, which was executed by the defendant's manager at the time an attachment suit was instituted by defendant company against Mullett. The defendant denies liability on the bond on the ground that the execution thereof was never authorized nor thereafter ratified. *Held*, that the defendant by pressing the litigation, of which the bond is a part, ratified the execution of the bond. *State ex rel. v. Parke-Davis & Co.*, 219.
3. **Bond Under Seal: Authority of Agent: Ratification.** The authority of an agent to execute a bond required by law to be under seal, must be shown and conferred by an instrument executed with the same formality. Ratification cannot be established by anything less than a writing under seal, provided, there is no elements of equitable estoppel involved. *Ib.*
4. **Agent: "Agt.": Abbreviation.** The letters "Agt." appended to a signature are understood commercially to be an abbreviation for the word "Agent." *Cockrell v. Williams*, 246.
5. **Individual: Signature.** A contract agreeing that "the company" (a private corporation), would pay \$1000 and signed by the company and another, who appended "Agt." to his name is the obligation of both. *Ib.*
6. **Contract: Individual: Evidence: Aliunde.** Where one signs his name to a note or contract with the letters "Agt." added to his name, he is *prima facie*, bound individually; but he may show that he was only an agent and not bound as an individual. Authorities discussed. *Ib.*
7. **Endorsement of Check: Authority of Travelling Salesman.** A travelling salesman for a wholesale grocery house with authority to sell and receive cash payments and also checks payable to the wholesale house, has no authority to endorse such check. And a bank accepting such endorsement and paying the money is guilty of a conversion. *Kansas City Casualty Co. v. Bank*, 287.
8. **Same.** The fact that a travelling salesman for a wholesale house with authority to collect cash for sales and to receive checks payable to the house, deposits the cash with a bank to his individual credit and then checks it out to the house is not evidence sufficient to show that such salesman has, without authority, also endorsed its name on checks and deposited them to his own credit. *Ib.*
9. **Existence of Agency: Conflicting Instructions.** Where the question of whether an agency was created was a material issue, the giving of conflicting instructions, one of which declared that the agency existed, as a matter of law, and the other of which submitted that question to the jury for determination, was reversible error. *Boeckeler Lumber Co. v. Wahlbrink*, 334.

PRINCIPAL AND SURETY. See Attachments, 1; Executors and Administrators, 1, 2.

Mechanics' Liens: Contractors: Materialmen: Right of Recovery on Bond. The plaintiffs, who sold to a contractor materials which were used in the construction of a building, sued the defendant on a bond, which the defendant furnished to the contractor to protect the owner against mechanic's liens. The plaintiffs filed a mechanic's lien against the building and brought a suit thereon. *Held*, that the bond was for the benefit of the obligee, the owner, and not for the materialman. *Uhrich v. Surety Co.*, 111.

PROBATE COURTS. See Bills and Notes, 1; Executors and Administrators.

PUBLIC IMPROVEMENTS. See Municipal Corporations, 9, 10, 11, 12, 14.

PUBLIC OFFICERS. See Municipal Corporations, 13, 15.

QUANTUM MERUIT. See Municipal Corporations, 11.

RAILROADS. See Carriers of Passengers; Common Carriers; Damages, 1; Street Railways.

1. **Injury to Employee: Federal Employer's Liability Act.** The plaintiff sued to recover damages from defendant, for the negligent placing of a piece of "scrap" or "junk" rubber hose, so that when plaintiff descended a ladder on which he had been working cleaning an engine he stepped upon it thereby severely spraining his ankle. *Held*, that defendant's demurrer to the evidence was properly overruled. *Cross v. R. R.*, 202.

2. **Injury to Engineer: Sufficiency of Evidence.** In an action for injuries to a locomotive engineer by an explosion of his engine, evidence *held* insufficient to justify a finding that the crown sheet, as distinguished from the stay bolts, was defective, and hence it was proper to withdraw that issue from the jury. [NORTON, J., dissents.] *Sparkman v. R. R.*, 463.

RECEIVERS.

Vacating Appointment: Insufficient Petition. Where a receiver is appointed in an action to set aside a conveyance of real estate for fraud and it appears that no cause of action is stated in the petition the order appointing the receiver should be vacated. *Commercial State Bank v. Ankrum*, 251.

RES ADJUDICATA.

1. **Matters Concluded: Identity of Causes of Action: Adjudication not on Merits: Splitting Demands.** Defendant represented to plaintiff's intestate that he was the agent of the owner of certain land, which, as a matter of fact, was nonexistent, and entered into negotiations with her for an exchange of land belonging to her for the fictitious property. In the negotiations, defendant used a false plat, purporting to be a true copy from the records of the county in which the fictitious land was represented to be located, which bore a certificate by him, over his hand and seal as a notary public, to the effect that the plat was a correct copy of the original on record. A false abstract also was furnished plaintiff's intestate, appearing on its face to show

RES ADJUDICATA—Continued.

perfect title in the putative owner of the fictitious land. Plaintiff's intestate made the exchange, the deed given to her appearing to have been acknowledged by the putative owner before defendant as a notary public. After discovering the fraud, plaintiff's intestate, as relator, instituted suit on the bond given by defendant as a notary public, on the theory that defendant had committed a breach of the bond, in and about said transaction. A recovery was denied relator for the reason that the action was barred by the special Statute of Limitations applicable to suits on bonds of notaries public (Sec. 10181, R. S. 1909). Subsequently, this action, for fraud on the part of defendant in inducing plaintiff's intestate to exchange her land for non-existent land, was instituted. *Held*, that the judgment rendered in the action on the bond, is not a bar to the present action for the reason that the two causes of action are not identical and no point adjudicated in the former action was presented for adjudication in the latter, and for the further reason that the judgment rendered in the former action was not an adjudication on the merits. *Held, further*, that the bringing of the two suits was not a splitting of the cause of action. *O'Malley v. Musick*, 405.

2. **Same: Adjudication not on Merits.** A suit is not barred by a former judgment unless such adjudication was on the merits. *Ib.*

REVENUE. See **Taxes.**

ROADS AND HIGHWAYS. See **Municipal Corporations**, 1, 2, 3, 4, 5, 6, 7, 8.

SALES. See **Evidence**, 6.

1. **Refusal to Accept Goods: Assignment of Reasons.** A buyer having more than one reason for rejecting the goods does not, by assigning one reason, conclusively admit that there is no other, and he may justify his refusal on another ground. *Grocery Co. v. Pillman*, 16.
2. **Contracts: Construction: Question for Court.** The construction of a contract of sale, evidenced by correspondence between the parties, is for the court. *Ib.*
3. **Place of Delivery.** Parties bargaining for a delivery of goods and mentioning no place of delivery are presumed to intend delivery at the place of business of the seller or where the articles sold are situated, and a delivery at any other place is not a good delivery. *Ib.*
4. **Same: Performance of Contract.** A wholesale dealer in fruit distributed circulars headed with its name, dated at the place where it did business, and advising the trade that it had strawberries to offer in car lots, that it was the sales agent of a growers' union controlling most of the berries in the vicinity of the place of business, and that it had engaged a certain person to do inspecting. A buyer, being advised of the market price, ordered a carload by telegram, addressed to the dealer at its place of business, and the dealer answered from there, accepting the order. *Held*, that the buyer could assume that he was buying strawberries produced in the vicinity of the place where the circular was dated, by local growers there, and that the berries would be shipped from that place, and that, before shipment, the berries would be inspected by the inspector named in

SALES—Continued.

the circular; and the dealer, in shipping berries produced elsewhere, from another point, and inspected by another, did not comply with the contract, and the buyer was justified in rejecting the shipment. *Ib.*

5. **Same: Customs and Usages: Rejection of Evidence.** In an action for the purchase price of perishable goods which the buyer refused to accept, defendant set up as a defense that, inasmuch as the contract was silent concerning the place of delivery, delivery should have been made at the seller's place of business, and was not made there, but was attempted to be made elsewhere. Plaintiff asked a witness if he was "familiar with the custom of the trade as to where goods are shipped from by the general produce man, when he makes an order from his central place of business, as to whether it is the custom to ship all the goods from the central place of business or whether he ships from other places." The court, in sustaining an objection to the question, remarked that "there might be a state of facts that would justify the conclusion that a person is bound by custom, but such a state of facts had not been shown." Plaintiff offered no further testimony to meet the suggestion of the court. *Held*, that the court did not err in sustaining the objection. *Ib.*
6. **Fraudulent Representation: Sufficiency of Evidence.** The plaintiff sold a threshing machine to defendants and took a chattel mortgage on it and on an old engine to secure notes given for the purchase price of the threshing machine. The machine did not work satisfactorily and defendants tendered back the machine, and demanded their notes and mortgages claiming they had been induced to purchase the machine through fraud. The plaintiff brought this action to foreclose mortgage and to obtain deficiency judgment. A verdict was rendered in favor of the defendants and plaintiff appealed. *Held*, that the jury having found for the defendants, the verdict must be accepted. *Richardson Mach. Co. v. Nelson*, 230.
7. **Same: Parol Evidence.** Where a sale is made by written contract this does not preclude defendant from showing that its execution was procured by fraud. And testimony of such fraud does not vary the terms of such a written contract. *Ib.*
8. **Same: Instructions.** In an instruction it is not necessary to tell the jury in so many words that the vendor must have known the representations were false and made them for the purpose of defrauding the vendees, the substance thereof being sufficient. *Ib.*
9. **Breach of Contract to Purchase: Remedies of Seller: Damages.** Where the buyer breached a contract to purchase corporate stock, the seller was not confined to a recovery of the difference between the market value and the contract price, but, upon tender of the stock, was entitled to recover the contract price. *Klein v. Johnson*, 453.
10. **Action for Purchase Price: Customs and Usages: Rejection of Evidence.** In an action by one commission merchant against another for the purchase price of string beans, plaintiff claimed that defendant purchased the beans unconditionally, knowing they were inferior in quality, for much less than the selling price of good beans, and that, after examining the beans

SALES—Continued.

contained in some of the hampers, he declined to make a further inspection. Defendant claimed that the purchase was by sample and that plaintiff agreed that the beans contained in the hampers not opened were of equal quality to those inspected. *Held*, that the court did not err in declining to complicate this issue by admitting evidence of a custom among commission men that goods purchased by sample might be returned if not equal to the sample. *Krallman v. Potashnick*, 516.

11. **Same: Instructions.** In an action by one commission merchant against another for the purchase price of string beans, plaintiff claimed that defendant purchased the beans unconditionally, knowing they were inferior in quality, for much less than the selling price of good beans, and that, after examining the beans contained in some of the hampers, he declined to make a further inspection. Defendant claimed that the purchase was by sample and that plaintiff agreed that the beans contained in the hampers not opened were of equal quality to those inspected. *Held*, that the issue involved was properly submitted by instructions to find for plaintiff, if defendant unconditionally purchased the beans at an agreed price, whether they were good or bad, and inspected a portion of them and declined to inspect the remainder, and to find for defendant if the beans were sold on condition that they were all to be in as good condition as those contained in the hampers that were opened and examined and if those in the hampers not opened were not in as good condition as those that were examined. *Ib.*
12. **Same: Evidence: Admissions.** In an action by one commission merchant against another for the purchase price of string beans, plaintiff claimed that defendant purchased the beans unconditionally, knowing they were inferior in quality, for much less than the selling price of good beans, and that, after examining the beans contained in some of the hampers, he declined to make a further inspection. Defendant claimed that the purchase was by sample and that plaintiff agreed that the beans contained in the hampers not opened were of equal quality to those inspected. Plaintiff, on cross-examination, stated that if the beans were rotten, he would not expect any person to pay for them. *Held*, that this was not, as claimed by defendant, an admission on his part that the contract was not as he stated it was, but, considered in connection with all of his testimony, amounted to nothing more than an admission that if *all* of the beans were rotten, he would not expect payment. *Ib.*

STATUTE OF FRAUDS.

1. **Corporations: Sale of Real Estate: Seal.** The contracts which the Statute of Frauds requires to be in writing, must be in writing, but as the Statute of Frauds does not require contracts within its purview to be under seal the contracts of corporations even for the sale of land do not have to be under seal. *State ex rel. v. Parke-Davis & Co.*, 219.
2. **Promise to Pay Debt of Another: Substitution of Debtors.** Where one agrees with the creditor of a third person to pay the debt, and the original debtor is fully released and discharged thereon, the contract is not within the Statute of Frauds (Sec. 2783, R. S. 1909), which provides that no action shall be brought on a promise to answer for the debt of another, unless the agreement or some memorandum thereof is in writing, etc., and hence the contract is valid, although not in writing, for, in such case, the original debt is gone, and a new one is created,

STATUTE OF FRAUDS—Continued.

with the promisor as a substituted debtor. *Moore v. McHaney*, 686.

3. **Same: Payment of Promisor's Own Debt.** Where one undertakes to pay the debt of another, and by the same act also pays his own debt, which is the motive for the promise, the undertaking is not within the Statute of Frauds (Sec. 2783, R. S. 1909) and hence need not be in writing. *Ib.*
4. **Same: Promise not Made to Creditor.** An oral agreement to pay the debt of another is not within the Statute of Frauds (Sec. 2783, R. S. 1909), where the promise is made to the debtor or some person other than the creditor; such an agreement, if founded upon a valid consideration, being an independent undertaking. *Ib.*
5. **Same: Independent Consideration Beneficial to Promisor.** An oral agreement to pay the debt of another which is essentially an original undertaking on the part of the promisor to pay a debt which he makes his own, as distinguished from a collateral promise to answer for the debt of another, is not invalidated by the Statute of Frauds (Sec. 2783, R. S. 1909); and a direct and unqualified oral promise to pay the debt of another is to be regarded as original in character and unaffected by the statute, notwithstanding the primary debt still subsists, where the promise is founded upon a new and independent consideration moving to the promisor and beneficial to him and which is the motive therefor. *Ib.*
6. **Same.** An oral promise to pay the debt of one who was working for the promisor, which debt was secured by a chattel mortgage on mules used in the work, if the creditor would refrain from taking the mules, was not within the Statute of Frauds (Sec. 2783, R. S. 1909), since the object of the promisor was to promote his own interest by having his employee retain the mules which were being used in his service, and this furnished a new and independent consideration moving to the promisor and beneficial to him. *Ib.*
7. **Effect of Performance of Contract.** Complete performance of a contract by one contracting party forecloses his adversary from interposing the Statute of Frauds as a defense. *Ib.*
8. **Promise to Pay Debt of Another: Instructions: Submitting Unnecessary Facts: Appellate Practice: Harmless Error.** In an action on an oral promise to pay the debt of another, an instruction given for plaintiff, which, in addition to requiring the jury to find that the promise was made in consideration of some benefit accruing directly to defendant, also required a finding that plaintiff released the original debtor, is not to be condemned as reversible error on the ground that there was no evidence tending to show that plaintiff released the principal debtor, since it merely required the jury to find more than was essential to plaintiff's recovery. *Ib.*

STATUTE OF LIMITATIONS.

Disabilities: Married Women. The provisions of the Statute of Limitations, relating to the time for bringing an action for fraud, do not, under Sec. 1894, R. S. 1909, apply to married women; and, under Sec. 1896, the personal representative of a deceased married woman may bring such an action within one year after her death. *O'Malley v. Musick*, 405.

STATUTES CITED AND CONSTRUED.

Revised Statutes 1855.

Sections 30, ch. 2, see page 216.

Revised Statutes 1879.

Section 2189, see page 215.

Revised Statutes 1889.

Section 2399, see page 226.

2514, see page 226.

Revised Statutes 1899.

Section 4562, see page 612.

5969, see page 585.

5985, see page 584.

7913, see page 550.

7939, see page 67.

Revised Statutes 1909.

Art. 1, chap. 78, see page 306.

Section 114, see page 216.

115, see page 217.

116, see page 215.

117, see pages 215, 218.

120, see page 217.

349, see page 217.

350, see page 217.

351, see page 218.

355, see page 218.

1850, see page 105.

1894, see page 412.

1896, see page 412.

2082, see pages 103, 105,
238.

2083, see page 103.

2168, see page 245.

2279, see page 600.

2335, see page 229.

2370, see page 241.

2373, see page 279.

2534, see page 363.

2773, see pages 223, 225.

2783, see page 693.

2788, see page 616.

2790, see page 226.

2793, see page 616.

2799, see page 226.

3001, see page 226.

4789, see page 241.

Section 5425, see page 236.

5426, see page 236.

5427, see page 236.

6354, see pages 9, 612.

6383, see page 535.

6945, see page 92.

6950, see page 545.

6962, see pages 420, 550.

6978, see pages 67, 69.

7025, see pages 327, 332.

7030, see pages 284, 314.

7049, see page 320.

7068, see page 391.

7179, see page 603.

7181, see page 601.

7828, see pages 7, 12, 13.

7901, see page 545.

8308, see page 363.

8309, see page 362.

8314, see page 305.

8315, see page 305.

9384, see pages 583, 585.

9407, see page 584.

10000, see page 568.

10050, see page 244.

10089, see pages 569, 571.

10090, see page 561.

10160, see page 574.

10161, see page 569.

10181, see page 411.

Session Acts.

Laws of 1836, see page 363.

1848, see page 362.

1850, see page 362.

1883, sec. 20, see page
226.

Laws of 1893, see page 117.

1907, sec. 69, see page
229.

1913, see page 91.

STREET RAILWAYS. See Carriers of Passengers.

Death of Child: Sufficiency of Evidence. The plaintiffs sued the defendants for the negligent death of their child. The plaintiffs claimed that the child, nineteen months old, went in front of a standing street car, and the servants of defendants negligently ran over the child. *Held*, that the plaintiffs were entitled to recover. *Baldwin v. Harvey*, 233.

TAXES. See Municipal Corporations, 14.

TENDER. See Life Insurance, 17.

1. **Effect of Tender: Admission.** A tender of a sum to the opposing party and depositing it in court is an admission that it is due that party. *Koslosky v. Bloch*, 257.
2. **Enjoining Foreclosure of Deed of Trust: Tender of Amount Due.** Where a beneficiary is proceeding to foreclose his deed of trust on the debtor's property, and the latter, believing the debt to have been paid, brings an injunction to prevent the sale, it is not necessary, as a requisite to his right to bring the action, that he should tender any sum, although the court finds that he still owes a balance. It is sufficient to authorize a judgment granting the injunction if he tenders the amount found by the court and deposits it in court. *Ib.*
3. **Same: Costs.** Although it is not necessary to make a tender to one who is proceeding to foreclose a deed of trust, before bringing an injunction against him, to prevent the sale, and although the court finds a balance is due the holder of the deed and the debtor then tenders it and pays it into court and the latter sustains the injunction, yet the holder of the deed of trust is entitled to a judgment for the costs. *Ib.*
4. **Sufficiency: Conditions.** In order for a tender to be availed of, it must be unconditional—that is, it must at least be unaccompanied by any condition to which the creditor has a right to object. *Parker v. Maccabees*, 508.
5. **Same.** If a debtor insist that the creditor admit that no more is due, in respect of the debt for which a tender is made, than the amount tendered, when the amount of the claim is in controversy, the tender is a conditional one and therefore ineffective. *Ib.*
6. **Same: Facts Stated.** Where a fraternal beneficiary association tendered to the beneficiary of a member who had committed suicide the amount due under the certificate, according to a provision of the by-laws, at a time when there was a difference between the decisions of two of the Courts of Appeals as to whether such limitation of liability was valid, on condition that the beneficiary agree to accept and receipt for the amount in full satisfaction of her claims under the certificate, there being no provision in the by-laws requiring a release in full, the tender was conditional, and hence did not stop the accrual of interest. *Ib.*

TRIAL PRACTICE. See Appellate Practice, 5; Attachments, 1; Contracts, 1; Conveyances, 1; Evidence, 4, 9, 10; Life Insurance, 12; Judgments, 1; Principal and Agent, 2; Sales, 2.

1. **Demurrer to Evidence: Rules of Decision.** In determining whether defendant's demurrer to the evidence should be given, plaintiff is entitled to the benefit of all the inferences which

TRIAL PRACTICE—Continued.

- the jury can legitimately and properly draw from the evidence. *Pfeiffer v. Supreme Tribe*, 38.
2. **Weight of Evidence: Questions for Jury.** The determination of what weight is to be given the evidence is a question for the jury. *Schuler v. Life Ins. Co.*, 52.
 3. **Weight of Evidence.** The determination of the weight of evidence is for the trial court, when acting as trier of the facts. *Griswold v. Haas*, 97.
 4. **Conflicting Evidence: Questions for Jury.** Where the evidence is conflicting, the question is for the jury. *Price v. Bldg. Co.*, 395.
 5. **Demurrer to Evidence: Rules of Decision.** In passing upon a demurrer to the evidence, the evidence must be viewed in the light most favorable to plaintiff, giving him the benefit of any inference favorable to him which may be fairly and reasonably drawn therefrom, and if the evidence is reasonably susceptible of two inferences, one lawfully supporting a right of recovery and the other fatal to plaintiff's case, leaving room for reasonable men to differ with respect thereto, the case is for the jury. *Yost v. Cement Co.*, 422.
 6. **Remarks of Court: Invited Remarks.** Where, in examining plaintiff, defendant's counsel asked plaintiff if he did not know that he was bolstering up his case with something that was not true, in testifying to a certain matter, and the court sustained an objection to the question with the remark that this was taking advantage of the witness when he could not protect himself and that the question was therefore improper, *held* that the question, in the form propounded, was highly improper and embarrassing to the witness, and defendant, therefore, was in no position to complain of the stricture laid upon it by the court. *Krallman v. Potashnick*, 516.
 7. **Reception of Evidence: Effect of Failure to Rule on Objections.** The failure of the trial court to rule on an objection to incompetent evidence is reversible error, where it does not appear that he subsequently ruled on it, or that he did not consider the evidence in making his finding. *Stone v. Fry*, 607.
 8. **Verdicts: Computation of Interest by Court.** An instruction that, if the jury found for plaintiff, their verdict should be for a certain sum, which was the amount of the principal of the promissory note sued on and interest computed thereon, was not erroneous, on the theory that the court had no right to instruct the jury as to the amount of the recovery. *Moore v. McHaney*, 686.

TRUSTS.

Failure to Appoint Trustee: Effect. The fact that a trustee of notes and securities constituting a general legacy was not appointed until long after the death of the testator would not prevent a recovery of interest due the trust estate, since a trust never fails by the mere failure of appointment or qualification of a trustee. *Asbury v. Shain*, 667.

"VALUE." See *Evidence*, 6.

VENDOR AND VENDEE. See *Sales*, 6, 7.

VERDICTS.

1. **Conformity to Instruction: Excessive Award of Damages.** If a petition for damages for negligence in driving an automobile against plaintiff's buggy, asks damages, in a lump sum, for the personal injury and injury to the horse and destruction of the buggy and harness; and, on account of failing to prove the value of the horse, buggy and harness, the court directed that no damages could be allowed for those items, yet the jury returned a verdict for the entire sum claimed, it was *held* that such verdict should be set aside. *Tapscott v. Tyson*, 253.
2. **Computation of Interest by Court.** An instruction that, if the jury found for plaintiff, their verdict should be for a certain sum, which was the amount of the principal of the promissory note sued on and interest computed thereon, was not erroneous, on the theory that the court had no right to instruct the jury as to the amount of the recovery. *Moore v. McHaney*, 686.

WILLS.

1. **Rules of Construction.** A will is to be interpreted through an examination of the whole instrument, in an attempt to arrive at the intention of the testator, and the technical import of words is not to prevail over the obvious intent of the testator; but that intent must not only clearly appear, but be capable of being carried out, and if the testator has so framed his will as to make it impossible to determine what he intended, then the court must construe it in accordance with accepted rules of interpretation and as the testator has written it—the true inquiry being, not what the testator meant to express, but what the words used actually do express. *Asbury v. Shain*, 867.
2. **Definitions: "General Legacy;" "Specific Legacy."** A legacy is general, where its amount or value is a charge upon the general assets in the hands of the executors, and where, if these are sufficient to meet all the provisions in the will, it must be satisfied; it is specific, when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other. *Ib.*
2. **Will Construed: General or Specific Legacy.** A will bequeathed in trust for testator's grandson notes and securities to the amount of \$5000, to remain on interest, and, as fast as collected, the proceeds to be reinvested in loans at the best rate of interest, and to continue to be invested until the grandson attained his majority. The inventory of testator's estate consisted of one hundred and ten shares of corporate stock and notes of the face value of \$12,113, of which \$6738 bore seven per cent interest and \$5375 bore six per cent interest. *Held*, that it was impossible to apply the legacy to any specific notes or securities, and hence the legacy was a general one, payable out of the general assets of the estate. *Ib.*
4. **Interest on Legacy: Demand.** As a general rule, a general legacy does not bear interest until the time fixed by law for distribution, or, where the will is contested, until after the termination of the contest, but where interest is specifically made a part of the legacy, it is to be allowed from the death of the testator, and no demand therefor is necessary. *Ib.*
5. **Same: Rate of Interest.** Where a will bequeathed notes and other securities to a certain amount, with interest, without

WILLS—Continued.

specifying the particular notes and other securities that were intended to be bequeathed, and testator's estate consisted of notes and other securities aggregating more than the amount of the bequest, some of the notes bearing six per cent per annum and others bearing seven, the legal rate of interest—six per cent per annum—was recoverable. *Asbury v. Shain*, 667.

WITNESSES. See Evidence, 4.

1. **Competency: Transactions with Deceased Person: Disinterested Witness.** The inhibition in Sec. 6354, R. S. 1909, against the surviving party to a contract or cause of action, or one claiming under him, testifying, when the other party is dead, applies only to the parties to the contract or cause of action, or those claiming under them, and their agents and attorneys; and hence, in an action for the death of an employee in a mill, from injuries sustained from moving shafting, it was proper to permit a State factory inspector to testify concerning a conversation he had with the superintendent of the mill, since deceased, relative to the shafting, since the factory inspector was in no way interested in the action. *Daniels v. Goeke*, 1.
2. **Competency: Transactions with Deceased Agent: Appellate Practice: Harmless Error.** In an action on a life insurance policy, evidence of a conversation between insured and the agent who solicited the insurance is not admissible against the company, after the death of the agent, under Sec. 6354, R. S. 1909; but the erroneous admission of such evidence may be harmless where it is merely cumulative and is only brought in casually. *Schuler v. Life Ins. Co.*, 52.
3. **Death of One Party to Contract: Competency of Survivor: Waiver.** It is not error to allow one party to a contract to testify, when the other party is dead, in the trial of a case in the circuit court, since she was allowed to testify in the trial in the probate court, without objection. The right to object to such testimony is deemed to have been waived. *Belch v. Roberts*, 243.
4. **Impeachment: Proof of Indictment Without Conviction Incompetent.** Although under Sec. 6383, R. S. 1909, the fact that a witness has been convicted of a criminal offense may be shown to affect his credibility, it is not competent to show that he has merely been charged with an offense by an indictment, information, or otherwise, for, until conviction, he is presumptively innocent and, *prima facie*, of good repute. *Kribs v. Foresters*, 524.
5. **Same.** The error in overruling an objection to a question, on cross-examination of the plaintiff in a civil action, as to whether he had been indicted for a felony, was not rendered harmless by his answer, that he had "knocked out" the indictment twice and that the case against him had not been tried, since it did not show that he had been acquitted of the charge. *Ib.*
6. **Transactions with Decedent: Competency of Survivor.** Under Sec. 6354, R. S. 1909, providing that, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, one who was a party, and the real party in interest,

WITNESSES—Continued.

to a contract was not a competent witness, in an action on the contract against the administrators of the other party thereto, although he was not a party to the action. *Stone v. Fry*, 607.

WORDS AND PHRASES. See **Definitions.**

WORK AND LABOR. See **Master and Servant.**

Acceptance of Compensation: Additional Claim for Services Rendered. When parties enter into the employment of a person and accept money, etc., as their compensation, without complaint, they cannot after his death maintain a valid claim against his estate for services over and above what they were paid, especially where they not only fail to prove a contract of employment, but also utterly fail to prove any indebtedness from their employer to them under the terms of that contract. *Stewart v. Estate of Turner*, 272.

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

KANSAS CITY COURT OF APPEALS.

contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the — day of —, 188—, executed on the — day of —, 188—;*" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

KANSAS CITY COURT OF APPEALS.

presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

KANSAS CITY COURT OF APPEALS.

RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

KANSAS CITY COURT OF APPEALS.

RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.
(Adopted, January 6, 1913.)

RULE 27. The defacement of books in the library by marking the margin of pages, or by drawing lines underneath printed matter, or by turning down the corners of leaves, is prohibited.

RULE 28. An abstract of the record is a court paper not for the exclusive benefit of either party; therefore, in printing such abstract the parties are forbidden to italicize any part of it, except where the record from which the abstract is taken is in italics. If italics are desired, they may be used in the statement, brief and written argument.

RULE 29. Where an original instruction is modified by the trial court, it is not necessary to print them separately in the abstract. The instruction, as modified, should be printed with the words of modification printed in italics, or between brackets, that the court may readily observe the point of difference.

RULE 30. Where there are several exhibits in the cause, they should be identified in the index to the abstract more definitely than by a mere number, or letter.

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

ST. LOUIS COURT OF APPEALS.

Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the _____ day of _____ 190—, executed on the _____ day of _____, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstract above referred to and of any

ST. LOUIS COURT OF APPEALS.

objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

ST. LOUIS COURT OF APPEALS.

the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

ST. LOUIS COURT OF APPEALS.

Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk. No motion to certify any case to the Supreme Court will be entertained nor shall any such motion be filed by the clerk. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 177 Mo. App. 477.

Rule 24 is hereby amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

(x)

ST. LOUIS COURT OF APPEALS.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

ST. LOUIS COURT OF APPEALS.

ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

ST. LOUIS COURT OF APPEALS.

states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove.

SPRINGFIELD COURT OF APPEALS.

then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided, that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

SPRINGFIELD COURT OF APPEALS.

days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

RULE 16.—When Appeal Is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

SPRINGFIELD COURT OF APPEALS.

essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st. 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard

SPRINGFIELD COURT OF APPEALS.

from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

SPRINGFIELD COURT OF APPEALS.

RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

Adopted March 3, 1913.

